89-1675

No.

Supreme Court, U.S.
FILED
APR 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CARL CARTER, FRANK PERCINA, WILLIAM E. DUNN, DONALD HONAKER, CAROLYN HUDSON, CLARA MORRISON, CHARLENE LIMENIH, and SIMILARLY SITUATED UNNAMED PLAINTIFFS, *Petitioners*,

v.

FRED GOLDBERG, JAMES A. BAKER III AND THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Whether the negotiated grievance-arbitration procedures of the Civil Service Reform Act of 1978 (5 U.S.C. 7121(a)) impliedly repealed the express statutory rights of union-represented federal employees to prosecute overtime claims in district court under the Fair Labor Standards Act (29 U.S.C. 216(b)).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	6
CONCLUSION	21
APPENDIX A	1a
APPENDIX B	14a
APPENDIX C	38a
APPENDIX D	48a
APPENDIX E	50a
APPENDIX F	52a
APPENDIX G	57a

TABLE OF AUTHORITIES

CASES: Page

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 6, 9, 10
Amell v. United States, 384 U.S. 158 (1966) 20
American Federation of Government Employees, Locals 225, 1504 and 3723, AFL-CIO v. FLRA, 712 F.2d 640 (D.C. Cir. 1983) 3
American Federation of Government Employees v. OPM, 821 F.2d 761 (D.C. Cir. 1987) 12
Atchison, Topeka and Santa Fe Railway Co. v. Buell, 480 U.S. 557 (1987) 6, 14
Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) ..... *passim*
Brooklyn Savings Bank v. O'Neill, 324 U.S. 697 (1945) 10
Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89 (1983) 16
Bush v. Lucas, 462 U.S. 376 (1985) 13, 14
Cornelius v. Nutt, 472 U.S. 648 (1985) 16
Davila v. Weinberger, 600 F. Supp. 599 (D.D.C. 1985) 7
Devine v. White, 697 F.2d 421 (D.C. Cir. 1983) 11, 12
Karahalios v. National Federation of Federal Employees, 109 S.Ct. 1282 (1989) 13, 14, 17
Lindahl v. OPM, 470 U.S. 768 (1985) 16
McDonald v. City of West Branch, Michigan, 466 U.S. 284 (1984) 9
Morton v. Mancari, 417 U.S. 535 (1974) 13
Rodriguez v. United States, 480 U.S. 522 (1987) 19
Sims v. Department of the Navy, 711 F.2d 1578 (Fed. Cir. 1983) 3
United States v. Fausto, 484 U.S. 439 (1987) 4, 13, 14, 16

STATUTES

Privacy Act of 1974, Pub. L. No. 93-597, 88 Stat. 1896
5 U.S.C. 552a(g)(1) 20

TABLE OF AUTHORITIES—Continued

	Page
Administrative Procedure Act, Ch. 324 §§ 1-12, 60 Stat. 237	
5 U.S.C. 553	20
5 U.S.C. 5542	20
Backpay Act of 1966, Pub. L. No. 89-380, 80 Stat. 94	
5 U.S.C. 5596(b) (1) (A) (ii)	3
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111	
5 U.S.C. 2302(b) (1)	18, 19
5 U.S.C. 7103(a) (9) (C) (ii)	2
5 U.S.C. 7104	12
5 U.S.C. 7105	12
5 U.S.C. 7114(a) (5) (B)	17
5 U.S.C. 7121	*passim*
5 U.S.C. 7121(a)	*passim*
5 U.S.C. 7121(a) (1)	*passim*
5 U.S.C. 7121(a) (2)	2
5 U.S.C. 7121(b) (3) (C)	2, 3
5 U.S.C. 7121(c)	3, 5
5 U.S.C. 7121(d)	5, 16, 17, 19
5 U.S.C. 7121(e)	5, 16, 17
5 U.S.C. 7121(e) (1)	19
5 U.S.C. 7121(f)	12
5 U S.C. 7122(a)	3
5 U S.C. 7123(a)	12
5 U.S.C. 7123(a) (1)	3, 12
5 U.S.C. 7701	19
5 U S.C. 7701(g)	3
5 U.S.C. 7702	19
28 U.S.C. 1254(1)	2
Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25	6
28 U S.C. 1295(a) (2)	7
28 U.S.C. 1331	7
28 U.S.C. 1346(a) (2)	7

TABLE OF AUTHORITIES—Continued

Page

Fair Labor Standards Act, Ch. 676, 52 Stat. 1060, 29 U.S.C. 201 *et seq.* 2
29 U.S.C. 202(a) 7
29 U.S.C. 204(f) 8, 9
29 U.S.C. 206(d) 18
29 U.S.C. 216(b) ..... *passim*
29 U.S.C. 216(c) 8
29 U.S.C. 255(a) 3, 11
Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 2
Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602
29 U.S.C. 631 18
29 U.S.C. 633(a) 18
Rehabilitation Act of 1973, Pub. L. No. 99-506, 100 Stat. 1808
29 U.S.C. 791 18
Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, 78 Stat. 241
42 U.S.C. 2000e-16 18

MISCELLANEOUS

Executive Order 11491, Section 13(a) 18
H.R. Rep. No. 1717, 95th Cong., 2d Sess. (1978) 17
Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, 96th Cong., 1st Sess. (Comm. Print 1979) 18, 19, 20
Negotiability in the Federal Sector, Henry R. Robinson (1981) 17
Union Recognition in the Federal Government, U.S. Office of Personnel Management, OELAR 87-02 (1987) 7

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No. ——

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v.

FRED GOLDBERG, JAMES A. BAKER III AND THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioners, Carl Carter, Frank Percina, William E. Dunn, Donald Honaker, Carolyn Hudson, Clara Morrison, Charlene Limenih, and similarly situated unnamed plaintiffs petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. 14a-37a) is published at 883 F.2d 1563. The opinion of the court of appeals *en banc* (*id.* at 1a-13a) is not yet published. The opinion of the district court (*id.* at 38a-47a) is published at 690 F. Supp. 897.

JURISDICTION

The judgment of the court of appeals, sitting *en banc*, was entered on March 30, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are 5 U.S.C. 7121 and 29 U.S.C. 216(b). They are set forth in Pet. App., *infra*, at 52a-56a.

STATEMENT

1. The seven named petitioners are employed by the Internal Revenue Service (IRS) as revenue officers and tax auditors. The petitioners filed suit in 1987 under the Fair Labor Standards Act, 29 U.S.C. 201, *et seq.* (FLSA), to recover unpaid overtime compensation, liquidated damages and attorney fees. *See* 29 U.S.C. 216(b).[1] After petitioners filed suit, several hundred similarly situated IRS employees affirmatively opted into the case, in accordance with 29 U.S.C. 216(b), by filing consent forms with the district court. Pet. App. 2a-4a.[2]

Petitioners are covered by a collective bargaining agreement between IRS and the National Treasury Employees Union (NTEU), which, as required by Chapter 71 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, *et seq.* (CSRA), contains procedures for the settlement of "grievances," including binding arbitration. *See* 5 U.S.C. 7121(a) & (b)(3)(C). Because the term "grievance" includes claimed violations of laws, rules and regulations that affect conditions of employment (5 U.S.C. 7103(a)(9)(C)(ii)), and because IRS and NTEU did not exclude FLSA claims from the grievance procedure (*see* 5 U.S.C. 7121(a)(2)), petition-

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[1] The provisions of the FLSA were extended to federal employees in 1974. Pub. L. No. 93-259, 88 Stat. 55.

[2] A list of these individuals is contained at Pet. App. 57a-60a.

ers had the right to use that procedure to pursue their FLSA claims. Pet. App. 3a.[3]

Employees, however, face at least four significant disadvantages when they attempt to use the negotiated procedure to challenge FLSA violations. First, they have no control over their legal claims because only the union or the agency has the right to invoke arbitration (5 U.S.C. 7121 (b)(3)(C)) or file exceptions to the arbitrator's award with the Federal Labor Relations Authority (FLRA). 5 U.S.C. 7122(a). Second, even if the union aggressively pursues the employee's claim, there is no right to judicial review because, with exceptions not relevant here, FLRA decisions on exceptions to arbitral awards are final and unreviewable. 5 U.S.C. 7123(a)(1). Third, unlike district courts, arbitrators are not empowered by the FLSA to award liquidated damages and may not award attorney fees unless the employee proves that such an award is "in the interests of justice" under the Backpay Act (5 U.S.C. 5596(b)(1)(A)(ii); 7701(g)). *See Sims v. Department of the Navy*, 711 F.2d 1578 (Fed. Cir. 1983). Finally, the contractual limitations period for instituting a grievance (which in this case is fifteen days) is typically much shorter than the two, or, in the case of willful violations, three year statutes of limitations for filing a civil action under the FLSA. *See* 29 U.S.C. 255(a).

2. Shortly after petitioners filed suit, IRS moved to dismiss, asserting that the district court lacked subject matter jurisdiction because the employees could have pursued their FLSA claims through the negotiated grievance

[3] The statute excludes five specific subjects from the grievance procedure, none of which are relevant here. 5 U.S.C. 7121(c). Under the CSRA, any matter that fits within the statutory definition of "grievance" *is* grievable unless the parties expressly exclude it from the scope of the negotiated procedure. *See American Federation of Government Employees, Locals 225, 1504 and 3723, AFL-CIO v. FLRA*, 712 F.2d 640, 642 (D.C. Cir. 1983).

procedure. Pet. App. 39a. The district court granted IRS' motion on the basis of 5 U.S.C. 7121(a)(1), which provides, with exceptions not relevant here, that negotiated grievance procedures "shall be the exclusive procedures for resolving grievances which fall within its coverage." *Id.* at 38a-47a.

3. On appeal, in a 2-1 decision, a panel of the United States Court of Appeals for the Federal Circuit reversed, holding that the district court had misinterpreted the CSRA to repeal by implication petitioners' rights under the FLSA to bring enforcement actions in district court. Pet. App. 14a-37a. Relying upon this Court's decision in *United States v. Fausto*, 484 U.S. 439, 452-53 (1988), the court explained that such repeals are " 'strongly disfavored'," and that petitioners' FLSA rights could not be eliminated absent an " 'irreconcilable conflict' " or " 'clear repugnancy' " between the "exclusive procedures" language of Section 7121(a) and the right to sue language of the FLSA at 29 U.S.C. 216(b). *Id.* at 21a-22a (citations omitted). It concluded that no conflict existed between the statutes because the legislative history of the CSRA signalled "that Congress intended the 'exclusive procedures' provision to foreclose access only to administrative procedures for settling disputes, and not to bar judicial remedies expressly provided by other statutes." *Id.* at 23a-24a. Further, "nothing in the language or the legislative history of section 7121" showed "that Congress intended to repeal or curtail the right of federal employees to sue in district court under the FLSA." *Id.* at 23a.

The panel's ruling was also supported by this Court's decision in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), which held that private-sector employees have an unfettered right to bring civil enforcement actions under the FLSA without regard to the "final and binding" (*id.* at 731) arbitration procedures of a collective bargaining agreement. Pet. App. 25a-28a.

Barrentine held that " 'Congress intended to give individual employees the right to bring their minimum wage claims under the FLSA in court, and . . . these congressionally granted FLSA rights are best protected in a judicial rather than an arbitral forum'." *Id.* at 26a, quoting *Barrentine*, 450 U.S. at 745. The panel found these considerations equally applicable to federal-sector FLSA cases, because federal unions, and not the individual employees, would control the grievance process, because arbitrators may not have the competence to resolve complex FLSA issues, and because, it concluded, employees would not be able to obtain liquidated damages or attorney fees and costs through arbitration. Pet. App. at 26a-28a, quoting *Barrentine*, 450 U.S. at 742-43; 744-45.

4. IRS filed a petition for rehearing, with suggestion for rehearing *en banc*. The panel denied rehearing. Pet. App. 50a-51a. The court of appeals, however, granted the suggestion for *en banc* reconsideration. *Id.* at 48a-49a. Without benefit of oral argument (which petitioners had requested by motion), the *en banc* court unanimously vacated the panel ruling, and issued a new decision, affirming the district court's dismissal of petitioners' FLSA suit for lack of subject matter jurisdiction. Pet. App. 1a-13a.

The *en banc* court summarily rejected petitioners' contention (and the panel majority's conclusion) that Section 7121(a) made the negotiated procedure exclusive as to alternative administrative procedures and was not intended to limit employees' statutory rights to bring civil actions in district court. Pet. App. 6a-7a. Because overtime claims are not excluded from the scope of the grievance procedure under section 7121(c), and are not excepted from the exclusivity provision by subsections (d) and (e) (which preserve the rights of union-represented federal employees to pursue "statutory procedures," including appeals to the Merit Systems Protection Board, in cases involving discrimination or serious adverse action), the lower court believed that the rights of peti-

tioners to file civil actions under the FLSA had been extinguished. *Id.*

The court refused to apply principles of statutory construction which "strongly disfavor" repeals by implication (Pet. App. 8a), because it believed that petitioners had waived their FLSA rights in favor of the negotiated procedure "by accepting a position covered by a collective bargaining agreement." *Id.* at 13a. The lower court also found entirely inapplicable this Court's decisions in *Barrentine*, in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and in *Atchison, Topeka and Santa Fe Railway Co. v. Buell*, 480 U.S. 557 (1987), because those cases arose in the private sector. *Id.* at 11a-13a. The court believed that it would have to "supplement" the CSRA scheme to exercise the jurisdiction section 16(b) of the FLSA confers on the federal courts to enforce the minimum wage and overtime claims of federal employees. *Id.* at 8a-11a; 12a-13a.

REASONS FOR GRANTING THE PETITION

The incorrect decision of the court below concerns an issue of exceptional importance to federal employees and threatens to severely vitiate the enforcement of the minimum wage and overtime provisions of the FLSA in the federal government. The lower court's ruling ignored all of the teachings of this Court's decision in *Barrentine v. Arkansas-Best Freight System, Inc.* regarding the nature of the FLSA's enforcement scheme, failed to follow cardinal principles of statutory construction which strongly disfavor repeals by implication, and misinterpreted the Civil Service Reform Act. Particularly because no other circuit may ever have the opportunity to address the important question that the Federal Circuit has resolved incorrectly, this Court's review is warranted now.[4]

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[4] The Federal Courts Improvement Act provides that the Federal Circuit has "exclusive jurisdiction" over appeals in cases where

1. Over one million employees of the federal government (62% of the workforce) are, like petitioners, covered by collective bargaining agreements. *Union Recognition in the Federal Government*, U.S. Office of Personnel Management, OELAR 87-02, p. 29 (1987). Under the decision of the lower court, all of these one million individuals are now precluded from prosecuting their FLSA overtime claims in district court, unless their collective bargaining representative and their employer agree to exclude grievances concerning FLSA violations from the negotiated procedure. As *Barrentine* shows, this far-reaching decision will seriously impede enforcement of the FLSA's broad remedial goals and frustrate the public interests that the statute serves.

Congress passed the FLSA more than fifty years ago in order to "protect all covered workers from substandard wages and oppressive working hours, 'labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well being of workers'." *Barrentine*, 450 U.S. at 739, quoting 29 U.S.C. 202(a). Section 16(b) of the FLSA is the centerpiece of the statute's enforcement scheme; it "grants individual employees broad access to the courts" (*id.* at 739-40), by providing that an aggrieved employee may bring an action to recover overtime pay "in any Federal or State court of competent jurisdiction." 29 U.S.C. 216(b). Indeed, "to encourage employees to enforce their FLSA rights in court,

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the district court's jurisdiction was based "in whole or in part" on the Tucker Act. 28 U.S.C. 1295(a)(2). Petitioners invoked 28 U.S.C. 1331 and 28 U.S.C. 1346(a)(2) (the "Little Tucker Act") as alternative bases for jurisdiction in the district court. The federal government has successfully argued in other litigation that the Tucker Act provides the exclusive basis for district court jurisdiction over the FLSA claims of federal employees (*see Davila v. Weinberger*, 600 F. Supp. 599 (D.D.C. 1985)); if that position is correct, then the regional courts of appeals will never have the opportunity to review the issue this case presents.

and thus to further the public policies underlying the FLSA," Congress explicitly authorized individual employees to sue for "back wages and liquidated damages and to receive reasonable attorneys' fees and costs." *Barrentine*, 450 U.S. at 740, n.16 (citations omitted).

As the United States explained in its brief *amicus curiae* before this Court in *Barrentine*, "[a]ny restriction on the ability of affected employees fully to pursue their statutory rights . . . has a significant negative impact on the enforcement of the Act." Brief for the United States as *Amicus Curiae*, Barrentine v. Arkansas-Best Freight System, Inc., No. 79-2006, at 1. Indeed, "the court's refusal to entertain an FLSA claim . . . may result in the retention of pay practices that are in apparent violation of the Act." *Id.*[5]

This scheme of judicial enforcement through individual suits is even more important in federal-sector FLSA cases than it is in private ones because Congress has not empowered the Secretary of Labor to bring judicial enforcement actions against federal employers, as he does against private employers. 29 U.S.C. 216(c). In fact, Congress underscored the critical importance of court enforcement of the FLSA by federal employees in Section 204(f), which stipulates that the authority of Civil Service Commission (now the Office of Personnel Man-

[5] The federal government has taken a different view in this case, but we note that it is itself a house divided on the issue presented here. IRS' position—that federal employees may not file civil actions under the FLSA if they have the right to use negotiated grievance procedures to challenge FLSA violations—was consistently opposed by the Office of Personnel Management (OPM) (at least up to IRS' submission of its petition for rehearing *en banc*). *See Memorandum for the Solicitor General*, submitted with IRS Motion for Enlargement of Time to file rehearing petition (observing that OPM "has not agreed with [the Justice Department's] position in the past and will probably recommend against *en banc*"). OPM, of course, is statutorily charged with administration of the FLSA in the federal sector (29 U.S.C. 204(f)).

agement) to administer the Act should not "be construed to affect the right of any employee to prosecute an FLSA claim in court." 29 U.S.C. 204(f).

The decision of the lower court completely undermines this FLSA enforcement scheme by subordinating the rights of individual federal employees to prosecute their FLSA claims in court to the procedures agreed upon by their union in collective bargaining, directly contrary to this Court's teachings in *Barrentine*. "[T]he FLSA rights petitioners seek to assert . . . are independent of the collective bargaining process. They devolve on petitioners as individual workers, not as members of a collective organization." *Barrentine*, 450 U.S. at 745; *see also Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984). FLSA rights "cannot be abridged by contract or otherwise waived, because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Barrentine*, 450 U.S. at 740 (citations omitted).

Thus, the central premise of the lower court's decision in this case—that petitioners in effect waived their FLSA rights and chose to rely instead upon the inferior negotiated grievance procedure when they accepted a position covered by a collective bargaining agreement (Pet. App. 8a; 13a)—is completely at odds with the central lesson of *Barrentine*.[6] *Barrentine* establishes, contrary to the lower court's decision, that the rights of individual employees to prosecute their FLSA claims in court are not merely procedural, but are *substantive* and non-waivable.

Further, the lower court's decision merits review because it relegates petitioners and perhaps one million

[6] Moreover, the notion that by accepting a job as an IRS employee in a bargaining unit position employees "choose" to abandon express statutory rights is sheer fiction, especially as to those employees who are not even union members or supporters.

other similarly situated federal employees to a forum that this Court has already found completely inadequate to protect their individual statutory rights and promote the FLSA's goals. Another of *Barrentine*'s central lessons, ignored by the lower court, is that the arbitral forum cannot be relied upon to enforce the FLSA because it is controlled exclusively by the union, which may reasonably decide that pursuit of an individual's FLSA claim is not in the interest of the collective group of employees it represents. *Barrentine*, 450 U.S. at 742.[7]

Moreover, the lower court's decision undermines vigorous enforcement of the FLSA in the federal workplace because there is some question whether arbitrators have the authority to award liquidated damages and attorney fees—remedies that are crucial to achieving the FLSA's public policy objectives. Congress intended these remedies to serve as a potent incentive to individual enforcement suits which advance the FLSA's policies (*see Barrentine*, 450 U.S. at 740, n. 16) and to deter employers from violating the FLSA. *Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697, 705 n. 16 (1945). The FLSA, however, empowered only courts, and not arbitrators, to award such remedies (*see* 29 U.S.C. 216(b)), and the government has consistently argued in this litigation that arbitrators do not have the power to order these FLSA remedies. *See also* Pet. App. 12a-13a; 27a (assuming lack of authority).

[7] The lower court observed (Pet. App. 12a) that union involvement in grievance procedures "is in theory if not always in practice a benefit . . ." and that an employee could file an unfair labor practice if the union mishandles his grievance. In *Barrentine*, however, this Court specifically instructed that a union might reasonably and without breaching its duty of fair representation decide not to pursue an individual employee's FLSA claim vigorously because "a union balancing individual and collective interests might validly permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole." 450 U.S. at 742; *see also Alexander v. Gardner-Denver*, 415 U.S. at 58, n.19.

Further, the lower court's decision potentially reduces the applicable limitations period for enforcing the FLSA from three years (29 U.S.C. 255(a)) to as little as two weeks, or whatever period the union and agency negotiate as the limit for filing grievances. Obviously, this would permit the employer to retain the benefits of its violations of the FLSA for a period substantially in excess of the one Congress has prescribed.

Finally, the court of appeals' decision merits review because it gives arbitrators—subject only to review by the Federal Labor Relations Authority—expansive authority to decide legal questions that have been within the domain of the federal judiciary for over fifty years. As this Court observed in *Barrentine*, arbitrators are generally not equipped to make these decisions: "because the 'specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land,' * * * many arbitrators may not be conversant with the public law considerations underlying the FLSA." 450 U.S. at 743 (citations omitted).

Contrary to the lower court's views (Pet. App. 12a), this concern is no less significant in the federal sector than in the private sector. Although federal-sector arbitrators have the authority to consider grievances that relate to laws, rules and regulations affecting conditions of employment, many federal-sector arbitrators are not lawyers, and the laws, rules and regulations they generally consider concern matters not materially different from those addressed by private-sector arbitrators, such as adverse personnel actions, performance appraisals, or labor-management relations. *See Devine v. White*, 697 F.2d 421, 438-39 (D.C. Cir. 1983) (observing that although rules at issue in federal-sector arbitrations are established by statute and regulation, they typically present "issues identical to those with which labor arbitrators deal on an everyday basis"). The legal questions presented under the FLSA, on the other hand, "typically

involve complex mixed questions of fact and law" and "must be resolved in light of volumes of legislative history and over four decades of legal interpretation and administrative rulings." *Barrentine*, 450 U.S. at 743; *cf. Devine v. White*, 697 F.2d at 439, n. 96 (contrasting issues typically addressed by federal-sector arbitrators with "public law" questions).

Further, the lower court's decision would radically transform the FLSA's enforcement mechanism from one that featured judicial involvement to one without any judicial review at all. Resolution of FLSA questions will be subject to a final unreviewable determination by the FLRA (5 U.S.C. 7123(a)(1)), a body whose primary function is to resolve labor-management disputes, negotiability questions, and the like. *See* 5 U.S.C. 7105.[8] This aspect of the lower court's decision is troubling not only because arbitrators and the FLRA lack the expertise to resolve FLSA questions, but also because without judicial oversight there is no way to insure that there will be uniform interpretation of the FLSA's requirements in the federal and private sectors, as Congress intended. *See American Federation of Government Employees v. OPM*, 821 F.2d 761, 769-71 (D.C. Cir. 1987). In fact, there is no way to insure uniform treatment between federal employees who are union represented and those who are not, or even to ensure consistency within the former group, because arbitral decisions are not precedential.[9]

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[8] There is no statutory requirement that FLRA members be attorneys (*see* 5 U.S.C. 7104) and in fact, at the present time, two of the FLRA's three members are not attorneys.

[9] It is especially anomalous to suggest that petitioners have no right to any judicial review of their FLSA claims in light of the fact that many decisions by federal-sector arbitrators that deal with far more routine personnel or labor relations matters are reviewable under the CSRA for legal error either directly to the Federal Circuit, or to the regional circuits (after a ruling by the FLRA), where an unfair labor practice is involved. *See* 5 U.S.C. 7121(f); 7123(a).

2. In addition to undermining the FLSA enforcement scheme, the lower court's decision is entirely inconsistent with this Court's decision in *United States v. Fausto*, 484 U.S. 439 (1987). *Fausto* held that certain "excepted service" federal employees, who have no remedy under the CSRA to challenge adverse personnel action in court, may not obtain judicial review of such action in the Claims Court under the Tucker Act and the Backpay Act. While concluding (484 U.S. at 448) that the CSRA's comprehensive scheme demonstrated the "considered congressional judgment" that those employees should not be able to secure judicial review of adverse action, the Court took pains to distinguish the CRSA's repeal of *judicial* interpretations of the Backpay Act—upon which the employees' pre-CSRA rights were based—from an implied repeal of "*express statutory text.*" *Id.* at 453 (emphasis added). In the latter case, the well established rule is that repeals by implication are "strongly disfavored" because it is "strongly presumed that Congress will specifically address language in the statute books that it wishes to change." *United States v. Fausto*, 484 U.S. at 453, citing *Morton v. Mancari*, 417 U.S. 535 (1974).

Fausto's application to this case is clear. In 1974, Congress gave all federal employees an express right in the "*statute books*" to prosecute their FLSA claims in court. 29 U.S.C. 216(b). It is inconceivable that, a mere four years later, Congress did an about-face and extinguished that right for federal workers covered by a collective bargaining agreement. Because nothing in section 7121 purports to "specifically address" (484 U.S. at 453), much less repeal petitioners' rights to bring their FLSA actions in court, such a repeal cannot be inferred without contravening the plain teaching of *Fausto*.[10]

[10] The lower court betrayed its fundamental misunderstanding of this Court's CSRA precedent generally and of *Fausto* in particular, when it repeatedly invoked *Bush v. Lucas*, 462 U.S. 376 (1985), *Karahalios v. National Federation of Federal Employees*, 109 S.Ct. 1282 (1989), and related but inapposite cases as bases for dis-

Further, a repeal of petitioners' FLSA rights also runs afoul of this Court's decision in *Atchison, Topeka and Santa Fe Railroad v. Buell*, 480 U.S. 557 (1987), a case closely analogous to this one. In *Buell*, this Court unanimously refused to rule that the grievance arbitration machinery of the Railway Labor Act (RLA) precluded a railroad employee's tort suit under the Federal Employer Liability Act (FELA). Quoting *Barrentine*, the Court held that notwithstanding the RLA's "exclusive" (480 U.S. at 565) grievance arbitration mechanism " 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to *individual* workers'." *Id.*, quoting 450 U.S. at 737 (emphasis added). The Court emphasized that "absent an intolerable conflict between the two statutes, we are unwilling to read the RLA as repealing any part of the FELA." *Id.* at 566-65.

The lower court made no effort to identify an "intolerable conflict" or "clear repugnancy" between Section 7121

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missing petitioners' FLSA suit. *See* Pet. App. 8a; 9a-11a; 13a. *Bush* held that in light of the CSRA's comprehensive scheme it would be improper for the court to authorize a new *nonstatutory* remedy for damages for federal employees whose constitutional rights are violated by their supervisors. Similarly, in *Karahalios* this Court refused to recognize an *implied* private cause of action to enforce the CSRA's duty of fair representation because Congress had created the duty in the CSRA itself and intended that it would be enforced through the Act's unfair labor practice procedures.

Here, of course, petitioners do not ask the court to "supplement" the CSRA with non-statutory remedies or implied causes of action; they merely seek to exercise the explicit statutory rights Congress has already given them under another statute—the FLSA. The issue here is not whether a new nonstatutory remedy should be invented or implied, but the very different question whether the CSRA, by implication, repealed a previously established statutory right of action. *See Fausto*, 484 U.S. at 453. It is, therefore, simply besides the point that, as the lower court discussed at length (Pet. App. 9a-11a), the CSRA does not contemplate actions in district court for violations of its provisions; petitioners seek to enforce the FLSA, not the CSRA.

(a) of the CSRA and the right to sue language of 29 U.S.C. 216(b). Its failure to make that inquiry and its belief that the "repeal by implication" doctrine does not pertain to this case (Pet. App. 7a-8a) constituted profound legal error. Before the CSRA was enacted, it is undisputed that *all* federal employees, including petitioners, possessed an express and *unconditional* statutory right to sue under the FLSA. It is only by operation of section 7121 (a)'s "exclusive procedures" language (as interpreted by the lower court) that federal employees no longer enjoy that unfettered statutory right. As we have explained (*supra*, n.3), under the CSRA, any matter that can be grieved under the statute is subject to the negotiated procedure, unless the parties agree otherwise. If the court of appeals' interpretation of section 7121(a)'s "exclusivity" language is correct, therefore, the union would have had to bargain with the agency to try to exclude FLSA claims from the grievance procedure in order to resurrect petitioners' rights to sue. In fact, the union and the agency could, by mere inadvertence, extinguish employees' individual statutory rights.

In short, under the lower court's ruling, the rights of individual workers to enforce and obtain judicial review of their FLSA claims, and to recover liquidated damages and attorney fees, are now contingent upon the union's desire and ability to secure an agency's concession to exclude FLSA claims from the grievance procedure. This result not only collides with *Barrentine*, it effectuates a repeal by implication of the previously unconditional rights of petitioners and other similarly situated federal employees to file civil actions under the FLSA.

3. There is no "clear repugnancy" or "irreconcilable conflict" between section 7121(a) of the CSRA and the FLSA. On the contrary, the language, structure and history of section 7121(a) establish clearly that the purpose of that provision was to make the negotiated grievance procedure exclusive as to other *administrative*

remedies available to federal employees and not to extinguish express judicial causes of action conferred by other statutes.

The CSRA " 'comprehensively overhauled the civil service system', creating an elaborate 'new framework for evaluating adverse personnel actions against federal employees'." *Fausto*, 484 U.S. at 443, quoting *Lindahl v. OPM*, 470 U.S. 768, 773-774 (1985). Among its "leading purpose[s]" was "to replace the haphazard arrangements for administrative and judicial review of personnel action," which had built up over nearly a century (*id.* at 444) with "an integrated scheme of administrative and judicial review" of such action. *Id.* at 445. Another "major purpose" of the CSRA was to strengthen the position of federal unions and to make collective bargaining "a more effective instrument of the public interest." *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 107 (1983). Thus, the statute also contains "the first statutory scheme governing labor relations between federal agencies and their employees" (*id.* at 91), a part of which is the requirement that collective bargaining agreements contain procedures for the settlement of "grievances." *See Cornelius v. Nutt*, 472 U.S. 648, 652 (1985).

Section 7121 synthesizes these two key elements of the CSRA's comprehensive plan—the negotiated grievance procedure and the "integrated scheme of administrative and judicial review" for considering personnel action. Its purpose—with enumerated exceptions—was to make the negotiated procedure the exclusive remedy used by union-represented employees, while employees who are not so represented can still resort to a variety of administrative remedies, as they could before the CSRA was enacted. Section 7121(a)(1) states that "except as provided in subsections (d) and (e) of this section, the [negotiated] procedures shall be the exclusive *procedures* for the settlement of grievances." 5 U.S.C. 7121(a)(1) (emphasis added).

By its own terms, section 7121(a)(1) does not purport to address, much less repeal, statutorily granted judicial rights of action. To infer that intent, one would have to read the word "procedures" to include judicial causes of action as well as administrative procedures. However, as the Conference Report on the CSRA explained, the exclusivity language of section 7121(a)(1) has a much narrower focus; it means that "except for certain specified exceptions [those set forth in subsections (d) and (e)], an employee covered by a collective bargaining agreement must follow the negotiated procedures rather than the *agency* procedures available to other employees not covered by an agreement." H.R. Rep. No. 1717, 95th Cong. 2d Sess. 157 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 2860, 2891 (emphasis added).[11]

Congress' enactment of subsections (d) and (e) of 7121 (the exception clauses to the exclusivity provision) also show that the purpose of section 7121(a) was to make the negotiated procedure exclusive only as to other administrative remedies available to federal employees. Although the lower court stated (Pet. App. 3a) that "in some cases" subsections (d) and (e) give employees the choice of resolving certain types of disputes through "judicial channels," in fact, the sole concern of those subsections is employees' rights to elect administrative remedies; the provisions have nothing to do with judicial review.

Subsection (d), for example, gives employees the right to elect either the negotiated procedure or "statutory procedures" for resolving complaints of discrimination that

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[11] *See also Karahalios*, 109 S.Ct. at 1288, citing 5 U.S.C. 7114(a)(5)(B) (observing that "collective bargaining mechanisms created by Title VII do not deprive employees of recourse to any of the remedies otherwise provided by statute or regulation"); Henry H. Robinson, *Negotiability in the Federal Sector*, 161 & n. 301 (1981) (clarifying that Congress intended the negotiated grievance procedure generally to be the exclusive substitute for other administrative remedies).

constitute "prohibited personnel practice[s] under section 2302(b)(1)." [12] The phrase "statutory procedures" is a term of art, derived from the phrase "statutory appeals procedure" which was used under the pre-CSRA Executive Order scheme. *See* Section 13(a), Executive Order 11491, as amended.[13] As used in Executive Order 11491 "statutory appeals procedures" included a vast array of *administrative* appeals procedures that were available to all federal employees before Congress reformed the system in 1978.[14]

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[12] Section 2302(b)(1) makes it a prohibited personnel practice to engage in discrimination on the basis of criteria that violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16; the Age Discrimination in Employment Act, 29 U.S.C. 631, 633a; Section 6(d) of the Fair Labor Standards Act (the "Equal Pay Act"), 29 U.S.C. 206(d); section 501 of the Rehabilitation Act, 29 U.S.C. 791; or on the basis of marital status or political affiliation as prohibited by any law, rule or regulation.

[13] *Reprinted in Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, 96th Cong., 1st Sess. 1346 (Comm. Print 1979) (hereinafter *"Legislative History"*). Section 13(a) of Executive Order 11491 provided, in pertinent part, that the parties to a collective bargaining agreement must negotiate the scope and coverage of the grievance procedure, "with the exception that it may not cover matters for which a statutory appeal procedure exists . . ." ***Id.***

[14] Before the CSRA was enacted, there were more than twenty "statutory appeals procedures," involving a number of different administrative appeals bodies, and which covered a broad range of personnel actions. *See* Federal Personnel Management Project, Option Paper Number Four (Sept. 20, 1977), *reprinted in Legislative History* at 1351, 1374-76. "Statutory appeals procedures" were procedures "established in Executive Order or regulations of appropriate authorities outside the agency to implement or administer the responsibilities assigned by statute." *Id.* at 1374, note *. One of these "statutory appeals procedures" was Civil Service Commission review of FLSA complaints. *Id.* at 1375, n.6.

It is instructive to note that when Congress enacted the CSRA, administrative remedies were available to any federal employee who

Similarly, subsection (e)(1) of section 7121, which concerns serious adverse personnel and performance based actions that do not involve discrimination, gives employees the right to elect administrative review under the "appellate procedures" of 5 U.S.C. 7701 (the MSPB) or under the negotiated procedure, but not both. It too makes no mention whatsoever of judicial review.

Section 7121's plain language and history thus demonstrate that, in an effort to streamline pre-CSRA administrative appeals mechanisms and reconcile them with negotiated procedures, Congress made the negotiated procedure exclusive, not as to *everything*, but only as to other *administrative* remedies. It was to that end that Congress established a general preference for an "exclusive" grievance procedure, and created an exception clause for cases involving discrimination and serious adverse action, giving employees the option to elect alternatives "statutory procedures" (*i.e.*, administrative remedies) in such cases. There is simply no indication in the CSRA's language or legislative history that Congress had *any* intent, much less a "clear and manifest" one (*Rodriguez v. United States*, 480 U.S. 522, 524 (1987)), to repeal the FLSA rights of the one million federal workers who are covered by collective bargaining agreements.[15]

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suffered discrimination on any of the bases set forth in 2302(b)(1). *See Legislative History* at 1374-76. In these cases, subsection (d) of section 7121 preserves employees' rights to elect either the administrative remedy or the negotiated procedure (but not both), although an employee may ask either the Merit Systems Protection Board (MSPB) (5 U.S.C. 7702), or the Equal Employment Opportunity Commission, as applicable, to review a final decision rendered under the negotiated procedure.

[15] The bit of history upon which the lower court relied (Pet. App. 7a)—demonstrating that the Conference Committee did not include the Senate bill's exclusion of FLSA claims from the grievance procedure but instead adopted the provisions of the House bill (which did not exempt FLSA claims)—proves only that Congress intended

4. Finally, because the CSRA permits employees to file grievances concerning the violation of any law, rule or regulation that affects conditions of employment, the lower court's broad interpretation of the CSRA's "exclusivity" provision threatens to reduce dramatically the availability of a broad variety of judicial remedies to union-represented federal employees. If the negotiated procedure pre-empts FLSA actions, the government would presumably also argue that other judicial remedies are similarly extinguished, such as those for violations of the Privacy Act (5 U.S.C. 552a(g)(1)), the Prevailing Rate Statute (*Amell v. United States*, 384 U.S. 158 (1966)), and the rulemaking requirements of the Administrative Procedure Act (5 U.S.C. 553). Indeed, given the broad definition of "grievance" in the CSRA, the logical extension of the lower court's decision might include preclusion of judicial actions challenging programs like employee drug testing, which implicate constitutional rights. The breadth of the lower court's rationale provides additional justification for this Court's review.

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to permit employees to use the negotiated procedure to raise their FLSA claims. In fact, the House Committee, which reported the original bill, had been urged by the Comptroller General to allow employees to file grievances over FLSA claims because such claims were often related to overtime claims under 5 U.S.C. 5542, which would be arbitrable. *Legislative History* at 1118, 1126. The fact that Congress decided to allow employees to grieve FLSA violations hardly demonstrates the further proposition that Congress intended to extinguish the FLSA right to file a civil action it had extended to federal employees only four years earlier. *See* Pet. App. 23a-25a (discussing legislative history in detail).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1990

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-1576

CARL CARTER, FRANK PERCINA, WILLIAM E. DUNN, DONALD HONAKER, CAROLYN HUDSON, CLARA MORRISON, CHARLENE LIMENIH and SIMILARLY SITUATED UNNAMED PLAINTIFFS,

Plaintiffs-Appellants,

v.

LAWRENCE GIBBS, JAMES A. BAKER, III and THE UNITED STATES OF AMERICA,

Defendants-Appellees.

Appealed from U.S. District Court
for the Central District of California
Judge Hupp

Decided: March 30, 1990

Gregory O'Duden, Director of Litigation, National Treasury Employees Union, of Washington, D.C., argued for plaintiffs-appellants. With him on the brief were *Clinton Wolcott*, Assistant Counsel, *Lucinda A. Riley*, Assistant Counsel and *Kerry L. Adams*, Assistant Director of Litigation. *Michele L. Rusen*, of National Treasury Employees Union, of counsel.

Robert A. Reutershan, Assistant Director, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendants-appellees. With him on the brief were *John R. Bolton*, Assistant Attorney General, *David M. Cohen*, Director and *Jane W. Vanneman*, Attorney, of counsel.

Before MARKEY, *Chief Judge*, RICH, *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge*, NIES, NEWMAN, ARCHER, MAYER, MICHEL, and PLAGER, *Circuit Judges*.

MAYER, *Circuit Judge*.

OPINION

This is a rehearing in banc of an appeal from the judgment of the United States District Court for the Central District of California dismissing for lack of subject matter jurisdiction the claims of several hundred Internal Revenue Service revenue officers and tax auditors for overtime pay allegedly due them under the Fair Labor Standards Act of 1938. *Carter v. Gibbs*, 690 F. Supp. 897 (1988). The earlier judgment and opinion of the court, 833 F.2d 1563 (1989), having been vacated, —— F.2d ——, we affirm the judgment of the district court.

Background

The seven named appellants are revenue officers and tax auditors employed by the Internal Revenue Service (IRS) who have worked a significant amount of overtime since 1981. However, pursuant to section 13 of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 213 (1982), the IRS has determined that these employees are exempt from the FLSA's overtime pay requirements. Therefore, rather than paying appellants for their overtime hours at a rate in accordance with the FSLA, *id.* § 207(a)(1), the IRS pays them either at the rate provided in the Federal Employment Pay Act

(FEPA), 5 U.S.C. § 5542(a)(2) (1982), or not at all. Because appellants are in relatively high pay grades, they receive less overtime pay under the FEPA than they would under the FLSA.

As members of the National Treasury Employees Union (union), appellants are covered by the collective bargaining agreement between the union and the IRS. Section 7121(a) of the Civil Service Reform Act of 1978 (CSRA) requires that all such agreements contain grievance procedures. In relevant part, it provides:

> (1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, *the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.*
>
> (2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

5 U.S.C. § 7121(a) (1988) (emphasis added).

Subsections (d) and (e) give employees a choice of resolving certain specified types of disputes either through the negotiated grievance procedures or through alternative administrative, and in some cases judicial, channels. The only other exceptions to subsection (a)(1)'s exclusivity provision appear in subsection (c), which excludes from the grievance process altogether disputes falling into one of five specified categories. *See id.* § 7121(c). The parties agree that none of subsections (c), (d), or (e) applies here. They also agree that an overtime pay dispute constitutes a "grievance" within the meaning of section 7103(a)(9) of the CSRA, and that their collective bargaining agreement does not exclude overtime pay disputes from its coverage, pursuant to section 7121(a)(2).

Nevertheless, the seven named appellants sought to resolve their pay disputes in federal district court. They invoked sections 7 and 16(b) of the FLSA, 29 U.S.C. §§ 207, 216(b), and claimed entitlement to allegedly unpaid overtime compensation as well as liquidated damages and attorney fees. As amended, section 16(b) provides:

> Any employer who violates the provisions of section 206 [minimum wage] or section 207 [maximum hours] of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . An action to recover the liability prescribed . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. . . .

Id. § 216(b). Several hundred similarly situated IRS employees subsequently joined the action by filing their written consent with the district court. All complainants alleged that the IRS had improperly determined they were exempt from section 7 of the FLSA, that they had worked overtime for which they had not been appropriately compensated under FLSA, and that, therefore, they were entitled to additional overtime pay. They invoked both federal question jurisdiction, 28 U.S.C. § 1331 (1982), and the Little Tucker Act, *id.* § 1346(a)(2), as bases for the district court's jurisdiction.

The government moved to dismiss the suit both for lack of subject matter jurisdiction and for improper venue. It contended that the CSRA provided an exclusive avenue of dispute resolution for federal employees covered by a collective bargaining agreement that did not exempt the disputed matter from its coverage. The government also asserted that even if appellants retained their FLSA section 16(b) right to sue the IRS, the claims of individual employees exceeded the $10,000 jurisdictional limit of the Little Tucker Act.

The district court dismissed the suit on the ground that the CSRA "preempted" the FLSA claims of these employees. 690 F. Supp. at 897. It held that, because the CSRA made grievance procedures contained in collective bargaining agreements the exclusive method of resolving disputes between the parties to those agreements, and because the union and the IRS chose not to exempt overtime pay disputes from their negotiated grievance process, it had no jurisdiction over the disputes. *Id.* at 898. The court also observed that "[j]udicial review is still available for all federal employees not covered by a collective bargaining agreement, and for those employees covered where the collective bargaining agreement excludes [Fair Labor Standards Act] claims from the grievance process." *Id.* at 900.

Appellants claim that the district court's resolution impermissibly allows the CSRA to repeal by implication their right to sue under the FLSA. They believe they should be free to seek resolution of their overtime pay disputes through the administrative procedures sanctioned by the CSRA, the judicial avenue offered by the FLSA, or both.

Discussion

The Civil Service Reform Act is unambiguous: "the procedures [set out in the collective bargaining agreement] shall be the exclusive procedures for resolving grievances which fall within its coverage." 5 U.S.C.

§ 7121(a)(1). There is no dispute that overtime claims, premised on an alleged violation of section 7 of the FLSA, 29 U.S.C. § 207, are "grievances" subject to the negotiated procedures. *See* 5 U.S.C. § 7103(a)(9)(C)(ii).[1] It is equally undisputed that the collective bargaining agreement does not exclude these claims from its grievance procedure pursuant to section 7121(a)(2). But appellants say the section 7121(a)(1) exclusivity prescription does not pertain, and accordingly they are entitled to bring suit in district court. There simply is no support for this proposition in either the CSRA or precedent.

I.

In subsections (d) and (e) of section 7121,[2] Congress specifically identified the grievances for which the negoti-

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[1] 5 U.S.C. § 7103(a)(9) provides:

"grievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting condition of employment . . . .

[2] The relevant portions of 5 U.S.C. §§ 7121(d) and (e) provide:

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title [discrimination] which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. . . .

(e)(1) Matters covered under sections 4303 [unacceptable performance] and 7512 [disciplinary actions] of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be

ated procedures are not exclusive; appellants' overtime claims are not among them. In subsection (c),[3] Congress specified matters that could not be resolved by negotiated procedures; overtime claims are not listed. This absence of an express provision for overtime claims is not the product of congressional inattention to the FLSA. To the contrary, the original Senate version of section 7121 (c) expressly included FLSA claims among those matters that could not be grieved. S. 2640, 95th Cong., 2d Sess. § 7221(d) (1978), *reprinted in* 1 Legislative History of the Civil Service Reform act of 1978, at 1832 (1979). But that proviso was removed in conference, and Congress excepted from section 7121(a)(1)'s exclusivity rule only one aspect of the FLSA: the Equal Pay Act, 29 U.S.C. § 206(d), which is now under section 7121(d).

Therefore, appellants premise their argument not on the CSRA or its history but on the principle of statutory construction that "silent repeals of express statutory text are strongly disfavored." Appellants contend that the CSRA cannot be construed as having done implicitly what it did not do explicitly: repeal the judicial access

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raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. . . .

[3] 5 U.S.C. § 7121(c) provides:

The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title [*i.e.*, one in the interests of national security];

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

afforded by section 16 of the FLSA, 29 U.S.C. § 216. But adherence to this principle does not advance their cause.

Now, as before the CSRA, federal employees are entitled to recover overtime compensation from the government "in any Federal or State court of competent jurisdiction." *Id.* § 216(b). The effect of Congress' decision to retain the FLSA overtime claims of unionized employees within the ambit of grievable matters, however, is to put them in the administrative rather than the judicial arena unless the parties otherwise agree. *See* 5 U.S.C. § 7121(a)(1), (2). That is, while "the collective bargaining mechanisms created by Title VII [5 U.S.C. § 7101-7904] do not deprive employees of recourse to any of the remedies otherwise provided by statute or regulation," *Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. ——, ——, 109 S.Ct. 1282, 1288 (1989), the agreement they negotiate with the government may. *See Harris v. United States*, 841 F.2d 1097, 1099 (Fed. Cir. 1988) (where collectively bargained procedures preclude access to the Claims Court, "the issue is not whether anyone's judicial review is foreclosed, but only whether a claimant must pursue one route or another"). Here the union and the IRS committed overtime grievances to the exclusive province of the negotiated procedures.

Properly put, the question here is not whether the CSRA implicitly repealed section 16 of the FLSA; it is whether an additional exception to CSRA section 7121(a)(1)'s exclusivity provision should be implied, an exception allowing review of overtime claims both in the courts and through the negotiated procedures. The answer is no.

II.

The CSRA "comprehensively overhauled the civil service system." *Lindahl v. OPM*, 470 U.S. 768, 773 (1985). In view of the "elaborate remedial system that has been

constructed step by step, with careful attention to conflicting policy considerations," *Bush v. Lucas*, 462 U.S. 367, 388 (1983), the Supreme Court has declined to grant federal employees access to the courts beyond that provided in the CSRA itself. Thus in *Bush*, the Court held there was no cause of action for damages under the First Amendment because it is "inappropriate" to "supplement" the "comprehensive procedural and substantive provisions" of the CSRA. *Id.* at 368. Likewise in *United States v. Fausto*, 484 U.S. 439, 445 (1988), the Court held that the CSRA's "integrated scheme of administrative and judicial review" barred review by the Claims Court of personnel decisions giving rise to claims for back pay. Significantly, the Court thereby foreclosed an avenue to the courts that, pre-CSRA, had been open to federal employees by statute. *Id.* at 451.

More recently, in *Karahalios* the Court held that, because the CSRA vests the Federal Labor Relations Authority with exclusive authority to enforce a union's statutory duty of fair representation, "a parallel remedy in federal district court" cannot be implied. 489 U.S. at ——, 109 S.Ct. at 1286. Importantly, the Court said that Title VII of the CSRA "provides recourse to the courts in only three instances," and that "[t]o hold that the district courts must entertain such cases in the first instance would seriously undermine what we deem to be the congressional scheme . . . ." *Id.* at ——, ——, 109 S.Ct. at 1286, 1288.

This goes far toward disposing of appellants' claims. In the judicial access provisions of the CSRA, only the Federal Labor Relations Authority can go to federal district court, and then only to petition for "appropriate temporary relief" from an alleged unfair labor practice. *See* 5 U.S.C. § 7123(d). Even where Congress expressly made exceptions to the otherwise exclusive bargained grievance procedures, it only gave federal employees access to appellate judicial review; it did not, in contrast to

appellants' proposal, allow de novo trials in the district courts.[4] *See id.* § 7121(d),(e)(1),(f). Moreover, judicial remedies parallel to administrative ones are nowhere provided. At most, an aggrieved employee may choose statutory procedures or negotiated procedures, "but not both." *See id.* § 7121(d), (e)(1). The point is clear: Congress narrowly circumscribed the role of the judiciary in its carefully crafted civil service scheme.

We have consistently heeded "the Supreme Court's admonitions to leave the architecture of the federal personnel system to Congress." *Volk v. Hobson*, 866 F.2d 1398, 1403 (Fed. Cir. 1989). In view of the exclusivity of collectively bargained procedures, we held in *Volk* that an elementary schoolteacher employed by the government could not seek judicial review of her discharge. We also stressed that courts "should abstain completely from inventing other remedies when Congress has set up a complete, integrated statutory scheme." *Id.* at 1402. We therefore concluded that Volk could not sue her superiors in district court for alleged due process violations.

Similarly, in *Carr v. United States*, 864 F.2d 144 (Fed. Cir. 1989), we followed the Supreme Court's counsel in *Fausto* and held that the CSRA deprived the Claims Court of jurisdiction to review Carr's removal from federal service. And in *Harris*, although reserving the particular question presented here, we held "the agreed procedure, arbitration, preclusive of other procedures [for resolving differential pay grievances,] and consequently, that resort to the Tucker Act is precluded." 841 F.2d at 1100. Other circuits are in accord. *See Montplaisir v. Leighton*, 875 F.2d 1, 3 (1st Cir. 1989), *and cases cited* ("The circuits have been equally as forthcoming; in a variety of settings, they have followed the

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[4] Recourse to district court may be available after an adverse decision by the Equal Employment Opportunity Commission. *See* 5 U.S.C. § 7121(d); 42 U.S.C. § 2000e-16(c).

Court's lead and treated CSRA as establishing the sole mechanism for resolving labor conflicts in the federal arena").

III.

Appellants' reliance on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), and *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), all dealing with private sector labor disputes, is misplaced. *Karahalios* expressly held that private sector law is not controlling in the context of federal labor controversies. Observing that "federal employment does not rest on contract in the private sector sense," 489 U.S. at ——, 109 S.Ct. at 1288, the Court declined to imply a judicial cause of action for union failure to fairly represent federal employees, even though in *Vaca v. Sipes*, 386 U.S. 171 (1967), it had done so for those in the private sector.

Distinctive features of the CSRA underlie the Court's rationale in *Karahalios* and are absent from the cases appellants rely upon. While Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, "permits judicial enforcement of private collective bargaining contracts," a comparable provision "for suing an agency in federal court" does not exist in the CSRA. 489 U.S. at ——, ——, 109 S.Ct. at 1287, 1288. Moreover, the CSRA is unique in prescribing "exclusive" procedures for the resolution of grievances. Indeed, in recognizing a judicial remedy in *Alexander*, the Court pointedly relied on legislative history showing that "the Senate defeated an amendment which would have made Title VII [of the Civil Rights Act of 1964] the exclusive federal remedy for most unlawful employment practices." 415 U.S. at 48 n.9.

In holding that bargained grievance procedures do not preclude statutory remedies in the private sector, the

Court also has emphasized that rights accorded in private labor-management agreements are separate and distinct from those secured by federal statutes. *See Alexander*, 415 U.S. at 50 ("contractual and statutory rights" are of a "distinctly separate nature"); *Barrentine*, 450 U.S. at 745 ("the FLSA rights petitioners seek to assert in this action are independent of the collective bargaining process"). Under the CSRA, however, the rights of a unionized federal employee are consolidated within the four corners of the collective agreement: Congress defined a "grievance" to include contractual disputes and "any claimed violation . . . of any law." 5 U.S.C. § 7103 (9)(C).

IV.

Appellants argue that a judicial cause of action must obtain because the negotiated grievance process is inferior to, and its results are not as expansive as, the judicial alternative. They say the process is deficient because an arbitrator may be incapable of resolving the legal issues presented in an overtime grievance and the procedures are union-controlled. The administrative remedy is allegedly incomplete because it does not include attorney's fees, liquidated damages, or costs.

In support of the first point, appellants again rely on private sector precedent. *See Barrentine*, 450 U.S. at 743. In the public sector, however, it is manifest that Congress intended arbitrators to develop the expertise requisite to the construction and application of federal labor laws. Again, the CSRA expressly defines grievances to include violations of law. 5 U.S.C. § 7103(9)(C). Furthermore, union involvement in the process is in theory if not always in practice a benefit to members rather than a detriment. In any event, it is part of the collective bargain; if the union is derelict in its duties, members have other statutory recourse. *See id.* §§ 7114(a)(1), 7116 (b)(8), 7118; *Karahalios*, 489 U.S. at ——, 109 S.Ct. at 1285-86.

As to the second point, *Bush* rejected a similar argument. Even assuming "that, as petitioner asserts, civil service remedies were not as effective as an individual damages remedy and did not fully compensate him for the harm he suffered," 462 U.S. at 372, it is not our office to supplement the CSRA. *Bush* teaches that because "'[t]he relations between the United States and its employees have presented a myriad of problems with which the Congress over the years has dealt, [and because g]overnment employment gives rise to policy questions of great import, both to the employees and to the Executive and Legislative Branches,'" 462 U.S. at 379 (quoting *United States v. Gilman*, 347 U.S. 507, 509 (1954)), it is for the legislature to define the respective rights and obligations of the government and its employees.

To be sure, Congress has extended the rights and remedies of the FLSA to federal employees. But the CSRA requires that federal employees subject to a collective bargaining agreement negotiate with their employing department or agency whether to preserve the FLSA remedy, or instead to commend FLSA claims to the bargained grievance procedures. By accepting a position covered by the collective bargaining agreement, appellants effectively chose the procedures negotiated by the union. They cannot now assail the sufficiency of those procedures, and we decline their invitation to meddle with the civil service system. *See Patterson v. McLean Credit Union*, 491 U.S. ——, ——, 109 S.Ct. 2363, 2375 (1989) ("We should be reluctant, however, to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute. *See United States v. Fausto*, 484 U.S. 439 (1988)").

Conclusion

Accordingly, the judgment of the district court is affirmed.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-1576

CARL CARTER, FRANK PERCINA, WILLIAM E. DUNN, DONALD HONAKER, CAROLYN HUDSON, CLARA MORRISON, CHARLENE LIMENIH and SIMILARLY SITUATED UNNAMED PLAINTIFFS,
Plaintiffs-Appellants,

v.

LAWRENCE GIBBS, JAMES A. BAKER III and THE UNITED STATES OF AMERICA,
Defendants-Appellees.

Appealed from U.S. District Court
for the Central District of California
Judge Hupp

DECIDED: August 31, 1989

Gregory O'Duden, Director of Litigation, of National Treasury Employees Union, of Washington, D.C., argued for plaintiffs-appellants. With him on the brief were *Clinton Wolcott*, Assistant Counsel, *Michele L. Rusen* and *Lucinda A. Riley*, Assistant Counsel.

Robert A. Reutershan, Assistant Director, Commercial Litigation Branch, Department of Justice, of Washing-

ton, D.C., argued for defendants-appellees. With him on the brief were *John R. Bolton*, Assistant Attorney General, *David M. Cohen*, Director and *Jane W. Vanneman*, Attorney, of counsel.

Before FRIEDMAN, MAYER, and MICHEL, *Circuit Judges.*

FRIEDMAN, *Circuit Judge.*

The question in this case, here on appeal from the United States District Court for the Central District of California, is whether government employees who are covered by a collective bargaining agreement containing a grievance procedure that does not exclude overtime claims under the Fair Labor Standards Act are precluded by the Civil Service Reform Act of 1978 from maintaining a suit in the district court for overtime pay under the Fair Labor Standards Act. The district court held that the Civil Service Reform Act bars such a suit. *Carter v. Gibbs*, 690 F. Supp. 897 (C.D. Cal. 1988). We reverse.

I

A. *The Statutes.* This case presents issues involving the interplay of provisions in two statutes governing the rights of federal employees, section 216(b) of the Fair Labor Standards Act of 1938 (FLSA) and section 7121 of the Civil Service Reform Act of 1978 (Reform Act).

1. *Section 216(b) of the Fair Labor Standards Act of 1938.* As originally enacted, section 216(b) of the Fair Labor Standards Act of 1938, ch. 676, § 16, 52 Stat. 1069, did not cover federal employees. It provided:

> Any employer who violates the provisions of section 206 [minimum wage provision] or section 207 [maximum hours provision] of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an

> additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated . . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

29 U.S.C. § 216(b) (1940). The terms "employer" and "employee," as defined in sections 203(d) and 203(e), respectively, specifically excluded federal employees. Section 203(d) defined "Employer" as "includ[ing] any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States," and section 203(e) defined "Employee" as "includ[ing] any individual employed by an employer."

In the Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 306, 80 Stat. 830, *reprinted in* 1966 U.S. Code Cong. & Admin. News 978, 990, Congress added section 218(b) to provide that approximately 685,000 federal employees—"certain Federal wage board employees, employees of naval facilities whose wages are established to conform with those in the immediate vicinity, and employees in nonappropriated fund instrumentalities of the Armed Forces"—were to receive a minimum wage and overtime pay not less than that provided in the FLSA (29 U.S.C. § 206(a)(1) and 29 U.S.C. § 207(a)(1), respectively). S. Rep. No. 1487, 89th Cong., 2d Sess., *reprinted* in 1966 U.S. Code Cong. & Admin. News 3002, 3036. Congress, however, did not amend the statutory definitions of employer or employee, and there is no indication that Congress intended to make applicable to those employees any other provision of the FLSA. *See* 1966 U.S. Code Cong. & Admin. News at 3036.

In the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, *reprinted in* 1974 U.S. Code Cong. & Admin. News 55, Congress extended the Act to cover, among others, most federal employees in nonsupervisory positions. It did so by changing the definition of "Employer" to "include[] a public agency," 29 U.S.C. § 203(d), which section 203(x) defined to include the "Government of the United States." The definition of "Employee" was changed to include "any individual employed by the Government of the United States" in six specified broad categories. 29 U.S.C. § 203(e). Section 216(b) was amended to give federal employees the right to sue the United States for violation of the minimum wage and maximum hour provisions of the FLSA by substituting the phrase "maintained against any employer (including a public agency) in any Federal or State Court" for the "maintained in any court of competent jurisdiction" language of the original 1938 Act. Section 216(b) now provides in pertinent part:

> An action to recover the liability prescribed [covering minimum wage and overtime pay] . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

2. *Section 7121 of the Civil Service Reform Act of 1978.* Prior to 1978, labor-management relations in the federal sector were governed by a 1962 Executive order. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 91 (1983). As part of the Reform Act's "comprehensive[] overhaul [of] the civil service system," *Lindahl v. OPM*, 470 U.S. 768, 773 (1985), title VII of the Act provided a statutory basis and framework for labor-management relations in the federal sector.

Section 7121 of the Act requires that, with certain exceptions discussed below, "any collective bargaining

agreement shall provide procedures for the settlement of grievances, including questions of arbitrability," and that "the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage." 5 U.S.C. § 7121(a)(1). Grievance is defined broadly in section 7103(a)(9) to include any complaint by "any employee concerning any matter relating" to his or her employment, "any labor organization concerning any matter relating to the employment of any employee," or "any employee, labor organization, or agency concerning— . . . any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment."

Subsection 7121(a)(2) provides that a collective bargaining agreement may exclude from its grievance procedures any matter that otherwise would be subject to those procedures. Subsection (b) provides that "any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency." Subsection (c) excludes certain matters from the grievance procedure, *e.g.*, retirement, insurance, suspensions or removals under section 7532, certifications or appointments, and certain classifications. Subsections (d) and (e) provide that employees who believe that they have been subject to prohibited personnel practices under section 2302(b)(1), employees who have been demoted or removed under section 4303, and employees who have been subject to adverse actions under section 7512, may pursue their claims through either the negotiated grievance procedure or other statutory procedures, but not both. Where an employee claims discrimination, the employee may file a grievance and, if he or she is not satisfied with the resolution of the grievance, may pursue the claim before the Merit Systems Protection Board or the Equal Employment Opportunity Commission.

B. *The Facts of This Case.* The seven named appellants are revenue officers and tax auditors employed by the Internal Revenue Service (IRS) who brought the present action in the district court seeking recovery of unpaid overtime compensation as well as liquidated damages and attorney's fees. *See* 29 U.S.C. § 216(b). All are members of the National Treasury and Employees Union (Union), and are subject to a collective bargaining agreement between the Union and the IRS. The collective bargaining agreement, negotiated pursuant to chapter 71 of 5 U.S.C., does not specifically exclude FLSA overtime pay claims from the grievance procedures.

After the complaint was filed, some 300 federal employees have joined the action, in accordance with 29 U.S.C. § 216(b).

On the government's motion, the district court dismissed the complaint for lack of subject matter jurisdiction, on the ground that the Reform Act "preempted" the appellants' FLSA cause of action. The court stated:

> § 7121 requires a collective bargaining agreement to contain grievance procedures. The parties to the agreement may exclude any matter from the grievance procedures. If a matter is not excluded by agreement, it must go through the established grievance process unless [it is] of the type specified in subsections (c), (d) or (e), which do not apply in this case.
>
> The parties do not dispute that the overtime claim is a grievance within the above definition, or that the claim is grievable through the collective bargaining agreement. The collective bargaining agreement entered into between the Union and the government does not exclude FLSA matters from operation of the grievance procedures.
>
> On a literal reading of the [sic] § 7121, plaintiffs' FLSA rights are within the exclusive jurisdiction of

> the grievance procedure. An FLSA claim is a grievance within the meaning of the statute, and is not excepted from the exclusive procedures by any subsection of § 7121.

The court further stated:

> This Court does not share plaintiffs' belief that the CSRA impliedly repealed judicial review of a federal employee's FLSA claim. Judicial review is still available for all federal employees not covered by a collective bargaining agreement, and for those employees covered where the collective bargaining agreement excludes FLSA claims from the grievance process. The CSRA did not impliedly repeal any part of the FLSA; it instead created a specific exception to the general enforcement scheme that parties to a collective bargaining are free to eliminate by agreement.

690 F. Supp. at 898, 900.

II

A. Although the district court held that the Reform Act "preempted" the appellants' cause of action under the FLSA, we think the proper inquiry is whether the Reform Act repealed by implication the appellants' right to sue under the FLSA. Preemption is a concept ordinarily used to determine whether a federal statute precludes the application of State law to a situation that both laws cover. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Here, however, the issue is whether one federal statute—the Reform Act—eliminates the right to sue previously granted by another federal statute—the FLSA. The issue, therefore, is not whether the Reform Act preempts the FLSA, but whether it supersedes it to the extent of barring the appellants from invoking the right to sue that the FLSA gave them.

Section 216(a) of the FLSA gives all federal employees (with certain exceptions not here applicable) the right

to bring an action in the district court to recover the minimum wage and overtime pay that the FLSA prescribes. If, as the district court held, section 7121 of the Reform Act bars employees covered by a collective bargaining agreement containing a grievance procedure that does not except FLSA claims from maintaining an FLSA suit, the effect of section 7121 is to eliminate the statutory right to sue that section 216(a) confers. This is a *pro tanto* repeal by implication of the general right to sue that section 216(a) gives to federal employees, since for those employees that right no longer exists because section 7121 has eliminated it. The elimination is not express but is by implication, since it is an inference drawn from the provision in section 7121(a)(1) that the bargaining agreement grievance procedures "shall be the exclusive procedures for resolving grievances which fall within its coverage."

In *United States v. Fausto*, 484 U.S. 439, ——, 108 S. Ct. 668, 676 (1988), the Supreme Court recently reiterated its agreement with the principle of statutory construction that "repeals by implication are strongly disfavored." *See also Rodriguez v. United States*, 480 U.S. 522, 524 (1987) ("repeals by implication are not favored"); *Randall v. Loftsgaarden*, 478 U.S. 647, 661 (1986) ("'[i]t is, of course, a cardinal principle of statutory construction that repeals by implication are not favored'"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133 (1974) ("repeals by implication are disfavored"). The consequence is that "a later statute will not be held to have implicitly repealed an earlier one unless there is a clear repugnancy between the two." *Fausto*, 484 U.S. at ——, 108 S. Ct. at 676.

The government argues that "there is a 'clear repugnancy' between the 'exclusive procedures' language contained in 5 U.S.C. § 7121(a)(1) and the right-to-sue language contained in 29 U.S.C. § 216(b)." We disagree.

"There is no 'irreconcilable conflict' here between the two Acts, nor is this a case in which 'the later act covers the whole situation of the earlier one and is clearly intended as a substitute.'" *Randall v. Loftsgaarden*, 478 U.S. 647, 661 (1986) (citations omitted).

The exclusivity feature of section 7121(a)(1) states that the grievance procedure shall be the "exclusive procedure for resolving grievances" that it covers. There is no "clear repugnancy" between making the collective bargaining procedure the exclusive method for the resolution of grievances that arise in labor management relations (including grievances relating to overtime pay) and permitting federal employees to maintain suit in the district court to recover overtime pay due them under the FLSA. The two statutory schemes deal with different situations, and permitting FLSA suits would not interfere with the operation of the collective bargaining grievance procedure.

Moreover, there are indications in the legislative history of the Reform Act that Congress intended the "exclusive procedures" provision to foreclose access only to alternative administrative procedures for settling disputes, and not to bar judicial remedies expressly provided by other statutes. *See Karahalios v. National Federation of Federal Employees*, —— U.S. ——, 109 S. Ct. 1282, 1288 (1989) ("the collective-bargaining mechanisms created by Title VII do not deprive employees of recourse to any of the remedies otherwise provided by statute or regulation"). The Conference Report on the final bill stated:

> Senate section 7221(a) provides that, except for certain specified exceptions, an employee covered by a collective bargaining agreement must follow the negotiated grievance procedures rather than the agency procedures available to other employees not covered by an agreement. House section 7121(a)

> does not limit the employee to the negotiated procedures in the case of any type of grievance.
>
> The House recedes.

H. R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 157, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2860, 2891.

There is nothing in the language or the legislative history of section 7121 that indicates that Congress intended to repeal or curtail the right of federal employees to sue in district court under the FLSA. Indeed, since Congress had created that right only four years earlier in 1974, one would think that if Congress had intended the Reform Act to take away that right for the substantial number of federal employees covered by collective bargaining agreements, it would expressly have so provided or stated. As the Supreme Court noted in *Fausto*, the purpose of the Reform Act was to "replace the haphazard arrangements for administrative and judicial review of personnel action, part of the "outdated patchwork of statutes and rules built up over almost a century' that was the civil service system." 484 U.S. 439, ——, 108 S. Ct. 668, 676 (1988) (citation omitted).

B. The district court relied heavily on Congress' deletion of a provision in the original Senate bill that would have specifically excluded FLSA matters from the scope of a negotiated grievance procedure. The district court stated:

> The original Senate version of the CSRA considered FLSA claims to be a specific exception to the exclusivity provisions of 7121(a), so that FLSA claims could never be grieved. . . . [T]he deletion of the Senate's original version makes clear that FLSA claims are grievable.
>
> Plaintiffs argue that deletion of the Senate version says nothing of whether *judicial* enforcement of the FLSA was intended to be barred—only of whether

> Congress intended that FLSA claims could be grieved. The Court disagrees. The original Senate version contemplated excluding FLSA claims from the grievance procedures, but Congress decided not to do so. By specifically allowing FLSA claims to become grievable, Congress must have intended that FLSA claims would then be subject to the exclusivity provisions of § 7121(a). There is no clear evidence to suggest that it intended otherwise, and the clear statement in the Act is not ambiguous.

690 F. Supp. at 899.

The provision of the Senate bill upon which the district court relied stated:

> (d) A negotiated grievance procedure may cover any matter within the authority of an agency if not inconsistent with the provisions of this chapter, except that it may not include matters involving examination, certification and appointment, suitability, classification, political activities, retirement, life and health insurance, national security or the Fair Labor Standards Act of 1938 (29 U.S.C. § 201 et. seq.).

S. 2640, 95th Cong., 2d Sess. § 7221(d) (1978), *reprinted in* 1 Legislative History of the Civil Service Reform Act of 1978, at 1832 (1979) [hereinafter *Legislative History*].

That provision, however, specified only the subjects that a negotiated grievance procedure could not cover. Congress' deletion of FLSA matters from the final list of nongrievable subjects does not indicate, or even suggest, that Congress thereby intended to extinguish the right of federal employees to bring suit in court under 29 U.S.C. § 216(b).

Section 7221(d) of the Senate bill was virtually identical to a provision in the Administration's original proposal for title VII of the Reform Act, which both Houses of Congress considered. The Comptroller General urged

the House Committee to eliminate FLSA matters from the list of nongrievable subjects the Administration had proposed. In his letter he noted that because employees could raise the same kinds of issues in a complaint under 5 U.S.C. § 5542 that are involved in FLSA claims, he recommended that "arbitration of overtime claims based upon the FLSA be permitted." *Legislative History of the Federal Service Labor Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, Comm. Print No. 7, 96th Cong., 1st Sess. 1126 (1978).

The House Committee bill deleted FLSA claims from the list of nongrievable matters set forth in section 7121(d). H.R. 11280, 95th Cong., 2d Sess. § 7121(d) (1978), *reprinted in* 1 *Legislative History* at 1259. That change, however, would have had no effect on an employee's right to file FLSA court suits, because the House Committee bill provided that the negotiated grievance procedures would be elective only and not the exclusive procedure for resolving grievances. The House Committee's deletion of FLSA claims from the list of nongrievable matters "would not constitute the 'clear and manifest' evidence of congressional intent necessary to establish repeal by implication." *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (per curiam). There is no suggestion in the legislative history that in deleting FLSA matters from the exceptions in section 7121(d), Congress intended that the exclusivity provision in the Senate bill would apply. Indeed, the bill the Senate passed would have excluded FLSA matters from the grievance procedures altogether. S. 2640, 95th Cong., 2d Sess. § 7221(d) (1978), *reprinted in* 1 *Legislative History* at 1832.

C. In *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), the Supreme Court dealt with a closely related issue. The question there was "whether an employee may bring an action in federal district court, alleging a violation of the minimum wage

provisions of the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.C. § 201 *et seq.*, after having unsuccessfully submitted a wage claim based on the same underlying facts to a joint grievance committee pursuant to the provisions of his union's collective-bargaining agreement." 450 U.S. at 729-30. The collective bargaining agreement required that "any controversy" between the parties "be resolved through the binding contractual grievance procedures." *Id.* at 736.

The Court held that the employees' right to bring suit under the FLSA "is not barred by the prior submission of their grievances to the contractual dispute-resolution procedures." *Id.* at 745. The Court explained that "Congress intended to give individual employees the right to bring their minimum-wage claims under the FLSA in court, and . . . these congressionally granted FLSA rights are best protected in a judicial rather than in an arbitral forum." *Id.* The Court noted that "[t]here are two reasons why an employee's right to a minimum wage and overtime pay under the FLSA might be lost if submission of his wage claim to arbitration precluded him from later bringing an FLSA suit in federal court." *Id.* at 742. The Court explained:

> First, even if the employee's claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration. . . . Since a union's objective is to maximize overall compensation of its members, not to ensure that each employee receives the best compensation deal available, a union balancing individual and collective interests might validly permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole. [Citation omitted].

> Second, even when the union has fairly and fully presented the employee's wage claim, the employee's statutory rights might still not be adequately protected. . . . [M]any arbitrators may not be conversant with the public law considerations underlying FLSA. . . . [They] may lack the competence to decide the ultimate legal issue whether an employee's right to a minimum wage or to overtime pay under the statute has been violated.
>
> . . . .
>
> Finally, not only are arbitral procedures less protective of individual statutory rights than are judicial procedures, but arbitrators very often are powerless to grant the aggrieved employees as broad a range of relief. Under the FLSA, courts can award actual and liquidated damages, reasonable attorney's fees, and costs. . . . It is most unlikely that [an arbitrator] will be authorized to award liquidated damages, costs, or attorney's fees. [Citations omitted].

Id. at 742-43, 744-45 (citations and footnotes omitted).

The government correctly notes that section 7121 is "not comparable to any statute applicable to the private sector." The concerns the Court expressed in *Barrentine*, however, are no less applicable to the present case.

Here, too, the unions may decide not to pursue a claim vigorously in or through all the steps of the grievance procedure, and the arbitrator may not have the competence to resolve the complex issues that FLSA claims may raise. Similarly, the relief that an employee could obtain under the grievance procedure could be substantially less than that available under the FLSA. In the grievance procedure the employee could not obtain liquidated damages in addition to the backpay to which he or she is entitled, or attorney fees and costs. We therefore

cannot accept the government's argument that "the relief available in federal sector arbitration of FLSA cases is not significantly different than the relief available from the courts."

Indeed, in one respect, the present case is stronger than *Barrentine* for permitting the FLSA suit. In *Barrentine* the employees already had utilized the grievance procedure to assert their backpay claim but had lost there; that fact did not bar their subsequent FLSA suit. In the present case, however, the employees never invoked the grievance procedure for their FLSA overtime claim, but asserted those claims only in their court case.

D. Finally, the government refers to 5 U.S.C. § 5542, which provides for the payment of overtime to government employees in specified circumstances. The government points out that claims for such overtime would be grievable and therefore under *Harris v. United States*, 841 F.2d 1097 (Fed. Cir. 1988), would be subject to the exclusivity provision in section 7121(a)(1). The government argues that "it simply would make no sense for Congress to dictate that claims for overtime pay under the FLSA and title 5 be subject to non-parallel resolution," *i.e.*, that "[g]rievable FLSA claims would be subject to resolution through both negotiated grievance procedures and through the filing of suit, while title 5 overtime claims could only be grieved."

We see no anomaly in giving federal employees the choice of asserting FLSA claims either through the grievance procedure or in court. Indeed, *Barrentine* sanctioned precisely that dichotomy for private employees. Moreover, in *Harris*, in holding that grievable claims for environmental differential pay authorized by 5 U.S.C. § 5343 may not be brought under the Tucker Act, this court pointed out that "[a]n entitlement created by nationwide federal law, as for example to statutory over-

time under the Fair Labor Standards Act, 29 U.S.C. § 216(b), would be a different matter. . . ." 841 F.2d at 1100.

CONCLUSION

The judgment of the United States District Court for the Central District of California is

REVERSED.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-1576

CARL CARTER, FRANK PERCINA, WILLIAM E. DUNN, DONALD HONAKER, CAROLYN HUDSON, CLARA MORRISON, CHARLENE LIMENIH and SIMILARLY SITUATED UNNAMED PLAINTIFFS,
Plaintiffs-Appellants,

v.

LAWRENCE GIBBS, JAMES A. BAKER III and THE UNITED STATES OF AMERICA,
Defendants-Appellees.

MAYER, *Circuit Judge*, dissenting.

The Civil Service Reform Act is unambiguous: "the procedures [set out in the collective bargaining agreement] shall be the exclusive procedures for resolving grievances which fall within its coverage." 5 U.S.C. § 7121(a)(1). There is no dispute that Carter's, and the other appellants', overtime claim, premised on an alleged violation of section 207 of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, is a "grievance" subject to the negotiated procedures. *See* 5 U.S.C. § 7103(a)(9)(C)(ii). But he says the section 7121(a)(1) exclusivity prescription does not pertain, and accordingly he is entitled to bring suit in district court. There is no support for this proposition in either the statute or precedent, and I cannot join the court's endorsement of it today.

In subsections (d) and (e) of section 7121, Congress specifically identified the grievances for which the negotiated procedures are not exclusive; Carter's overtime claim is not among them. In subsection (c), Congress specified matters that could not be resolved by negotiated procedures; overtime claims are not listed. This absence of an express provision for overtime claims was not the product of congressional inattention to the FLSA. To the contrary, the original Senate version of section 7121(c) expressly included FLSA claims among those matters that could not be grieved. But that proviso was removed in conference, and an exception was retained for only one aspect of the FLSA, the Equal Pay Act, 29 U.S.C. § 206(d), which is now under section 7121(d).

Without basis in the CSRA or its history therefore, Carter's argument is premised on the principle of statutory construction that "silent repeals of express statutory text are strongly disfavored." Absent an express repeal of the judicial access afforded by section 216 of the FLSA, 29 U.S.C. § 216, Carter contends that the CSRA cannot be construed as having implicitly done so. I agree, but don't see how this gets him into the district court.

Now, as before the CSRA, federal employees are entitled to "recover [overtime compensation] against [the government] in any . . . court of competent jurisdiction." *Id.* § 216(b). The effect of Congress' decision to retain FLSA claims within the ambit of grievable matters, however, is that unionized employees are free to use section 216 as a bargaining chip, and indeed must do so if their FLSA claims are to be judicially resolvable. *See* 5 U.S.C. § 7121(a)(1), (2). That is, while "the collective-bargaining mechanisms created by Title VII [5 U.S.C. § 7101 *et. seq.*] do not deprive employees of recourse to any of the remedies otherwise provided by statute or regulation," *Karahalios v. National Federation of Federal Employees, Local 1263*, 489 U.S. ——, ——,

109 S.Ct. 1282, 1288 (1989), the agreement they negotiate with the government may. *See Harris v. United States*, 841 F.2d 1097, 1099 (Fed. Cir. 1988) (where collectively bargained procedures preclude access to the Claims Court, "the issue is not whether anyone's judicial review is foreclosed, but only whether a claimant must pursue one route or another"). In the deal struck between the union and the Internal Revenue Service in our case, overtime grievances were committed to the exclusive province of the negotiated procedures.

Properly put, the question here is not whether the CSRA effected a repeal of section 216; it is whether an additional exception to section 7121(a)(1) of the CSRA, allowing dual review of overtime claims by the courts and through the negotiated procedures, should be implied. The answer is no.

The CSRA "comprehensively overhauled the civil service system." *Lindahl v. OPM*, 470 U.S. 768, 773 (1985). In view of the CSRA's "elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations," *Bush v. Lucas*, 462 U.S. 367, 388 (1983), the Supreme Court has declined to grant federal employees access to the courts beyond that provided in the CSRA itself. Thus in *Bush*, the Court held there was no cause of action for damages under the First Amendment because it is "inappropriate" to "supplement" the "comprehensive procedural and substantive provisions" of the CSRA. *Id.* at 368. Likewise in *United States v. Fausto*, 484 U.S. 439, ——, 108 S.Ct. 668, 672 (1988), the Court held that the CSRA's "integrated scheme of administrative and judicial review" barred review by the Claims Court of personnel decisions giving rise to claims for back pay. Significantly, the Court thereby foreclosed an avenue to the courts that, pre-CSRA, had been open to federal employees. *Id.* at ——, 108 S.Ct. at 676.

Most recently in *Karahalios*, the Court held that, because the CSRA vests the Federal Labor Relations Authority with exclusive authority to enforce a union's statutory duty of fair representation, "a parallel remedy in federal district court" cannot be implied. 489 U.S. at ——, 109 S.Ct. at 1286. Importantly, the Court said that Title VII of the CSRA "provides recourse to the courts in only three instances," and that "[t]o hold that the district courts must entertain such cases in the first instance would seriously undermine what we deem to be the congressional scheme . . . ." *Id.* at ——, ——, 109 S.Ct. at 1286, 1288.

This goes far in disposing of Carter's claim. In the judicial access provisions of the CSRA, only the Federal Labor Relations Authority can go to the district court, and then only to petition for "appropriate temporary relief" from an alleged unfair labor practice. *See* 5 U.S.C. § 7123(d). Even where Congress expressly made exceptions to the exclusive bargained procedures, it only gave access to appellate judicial review; it did not, in contrast to Carter's proposal, allow de novo trials in the district courts,* *See id.* § 7121(d), (e)(1), (f). Moreover, parallel judicial remedies are nowhere provided. At best an aggrieved employee may choose statutory procedures or the negotiated procedure, "but not both." *See id.* § 7121(d), (e)(1). The point is clear: Congress narrowly circumscribed the role of the judiciary in its carefully crafted civil service scheme.

Until today, we followed "the Supreme Court's admonitions to leave the architecture of the federal personnel system to Congress." *Volk v. Hobson*, 866 F.2d 1398, 1403 (Fed. Cir. 1989). In view of the exclusivity of collectively bargained procedures, we held that Volk,

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* Recourse to district court may be available after an adverse decision by the Equal Employment Opportunity Commission. *See* 5 U.S.C. § 7121(d); 42 U.S.C. § 2000e-16(c).

an elementary school teacher employed by the government, could not seek judicial review of her discharge. In addition, we said that courts "should abstain completely from inventing other remedies when Congress has set up a complete, integrated statutory scheme." *Id.* at 1402. We therefore concluded that Volk could not sue her superiors in district court for alleged due process violations.

Similarly, in *Carr v. United States*, 864 F.2d 144 (Fed. Cir. 1989), we heeded the Supreme Court's counsel in *Fausto*, and held that post-CSRA the Claims Court did not have jurisdiction to review Carr's removal from federal service. And in *Harris*, although reserving the particular question presented here, we held "the agreed procedure, arbitration, preclusive of other procedures [for resolving differential pay grievances,] and consequently, that resort to the Tucker Act is precluded." 841 F.2d at 1100. Other circuits are in accord. *See Montplaisir v. Leighton*, 875 F.2d 1, 3 (1st Cir. 1989), *and cases cited* ("The circuits have been equally as forthcoming; in a variety of settings, they have followed the Court's lead and treated CSRA as establishing the sole mechanism for resolving labor conflicts in the federal arena").

Carter's reliance on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), *Barrentine v. Arkansas Best Freight System, Inc.*, 450 U.S. 728 (1981), and *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), all dealing with private sector labor disputes, is misplaced. *Karahalios* expressly held that private sector law is not controlling in the context of federal labor controversies. Observing that "federal employment does not rest on contract in the private sector sense," 489 U.S. at ——, 109 S.Ct. at 1288, the Court declined to imply a judicial cause of action for federal employees, even though in *Vaca v. Sipes*, 386 U.S. 171 (1967), it had done so for those in the private sector.

Distinctive features of the CSRA underlie the Court's rationale in *Karahalios*, and avoid the cases relied upon by Carter. While Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, "permits judicial enforcement of private collective-bargaining contracts," a comparable provision "for suing an agency in federal court" is not found in the CSRA. 489 U.S. at ——, ——, 109 S.Ct. at 1287, 1288. Moreover, the CSRA is unique in prescribing "exclusive" procedures for the resolution of grievances. Indeed, in recognizing a judicial remedy in *Alexander*, the Court pointedly relied on legislative history showing that "the Senate defeated an amendment which would have made Title VII [of the Civil Rights Act of 1964] the exclusive federal remedy for most unlawful employment practices." 415 U.S. at 48 n.9.

In holding that bargained procedures are not preclusive of statutory remedies in the private sector, the Court also has emphasized that rights accorded in private labor-management agreements are separate and distinct from those secured by federal statutes. *See Alexander*, 415 U.S. at 50 ("contractual and statutory rights" are of a "distinctly separate nature"); *Barrentine*, 450 U.S. at 745 ("the FLSA rights petitioners seek to assert in this action are independent of the collective-bargaining process"). Under the CSRA, however, the rights of a unionized federal employee are consolidated within the four corners of the collective agreement: Congress defined a "grievance" to include contractual disputes and "any claimed violation . . . of any law." 5 U.S.C. § 7103 (9)(C).

Carter's further argument that a judicial cause of action must obtain because the negotiated procedures provide an inferior remedy is also unpersuasive. He says the negotiated procedures are deficient because an arbitrator may be incapable of resolving the legal issues presented in an overtime grievance, and because the

procedures are union-controlled and do not authorize the award of attorney's fees, liquidated damages, or costs.

In support of his first point, Carter again relies on private sector precedent. *See Barrentine*, 450 U.S. at 743. In the federal sector, however, it is manifest that Congress intended arbitrators to develop the expertise requisite to the construction and application of federal labor laws. Again, the CSRA expressly defines grievances to include violations of law. 5 U.S.C. § 7103(9)(C). Moreover, arbitral awards are accorded substantial finality and judicial review is, with but one exception, foreclosed. *See id.* §§ 7122, 7123.

As to the second point, a similar argument was rejected by *Bush*. Even assuming "that, as petitioner asserts, civil service remedies were not as effective as an individual damages remedy and did not fully compensate him for the harm he suffered," 462 U.S. at 372, it is not our office to supplement the CSRA. *Bush* teaches that because " '[t]he relations between the United States and its employees have presented a myriad of problems with which the Congress over the years has dealt[, and because g]overnment employment gives rise to policy questions of great import, both to the employees and to the Executive and Legislative Branches,' " 462 U.S. at 379 (quoting *United States v. Gilman*, 347 U.S. 507, 509 (1954)), it is for the legislature to define the respective rights and obligations of the government and its employees.

To be sure, Congress has extended the rights and remedies of the FLSA to federal employees. Post-CSRA, however, collective bargaining employees must negotiate with their employing agency whether the statutory remedy will be preserved or FLSA claims will be among those commended to the bargained procedures. Here, by his membership in the union, Carter effectively chose the procedures negotiated by his union representative. He

should not now be heard to assail their sufficiency, and we should decline his invitation to meddle with the civil service system. *See Patterson v. McLean Credit Union*, 491 U.S. ——, ——, 109 S.Ct. 2363, 2375 (1989) ("We should be reluctant, however, to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute. *See United States v. Fausto*, 484 U.S. 439 (1988)").

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 87-4897-HLH

CARL CARTER, *et al.*,
plaintiffs,

vs.

LAWRENCE GIBBS, *et al.*,
defendants.

ORDER DISMISSING ACTION FOR LACK OF SUBJECT MATTER JURISDICTION

[Filed Aug. 8, 1988]

I

On July 28, 1987 plaintiffs filed this action under the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq. (FLSA), for recovery of overtime pay. Named plaintiffs are seven Revenue Officers, employed by the Department of Treasury, Internal Revenue Service, at Grades 11 and 12. All are members of the National Treasury and Employees Union, and are subject to a collective bargaining agreement entered into between the Union and the government.

Since the complaint has been filed, almost 300 federal employees have opted into the action under the provisions of 29 U.S.C. § 216(b), which allows aggrieved employees to become party plaintiffs by filing written consent forms with the court.

Defendants move to dismiss the complaint pursuant to Rules 12(b)(1) and (3) of the Federal Rules of Civil Procedure, for lack of subject matter jurisdiction and improper venue. This Court holds that the Civil Service Reform Act of 1978 (CSRA) preempts district court jurisdiction over a claim under the Fair Labor Standards Act (FLSA) brought by a federal civil servant represented by a union and working under a collective bargaining agreement, and dismisses the action for lack of subject matter jurisdiction.

II

A. CSRA and Exclusivity of the Grievance Procedures.

Congress enacted the CSRA in part to establish a system for resolving grievances of federal civil servants subject to collective bargaining agreements. Collective bargaining agreements between federal employers and unions are required to contain procedures for the settlement of grievances. 5 U.S.C. § 7121(a)(1). All grievances are channeled into the established process, unless of a type specifically excluded by the collective bargaining agreement, or by § 7121(c), (d) or (e). Thus, § 7121(a)(1) states that the grievance ". . . procedures shall be the exclusive procedures for resolving grievances which fall within its coverage." Section 7103(a)(9) defines a grievance as any complaint:

> (A) by any employee concerning any matter relating to the employment of the employee;
>
> . . .
>
> (C) by any employee, labor organization, or agency concerning—
>
> . . .
>
> (ii) any claimed violation, misinterpretation, or misapplication of *any law*, rule, or regulation affecting conditions of employment. (emphasis added)

Thus, unless somewhere else excluded, a FLSA overtime claim is a "grievance."

Section 7121(c) excepts certain claims completely from the grievance procedure (e.g., insurance, retirement, suspension), none of which are applicable here. Subsections (d) and (e) except discrimination claims and certain adverse personnel actions, respectively, and allow an employee the choice of either the grievance procedure or an appeal through the Merit Systems Protection Board or the EEOC. No other exceptions appear in the statute.

In summary, § 7121 requires a collective bargaining agreement to contain grievance procedures. The parties to the agreement may exclude any matter from the grievance procedures. If a matter is not excluded by agreement, it must go through the established grievance process unless of the type specified in subsections (c), (d) or (e), which do not apply in this case.

The parties do not dispute that the overtime claim is a grievance within the above definition, or that the claim is grievable through the collective bargaining agreement. The collective bargaining agreement entered into between the Union and the government does not exclude FLSA matters from operation of the grievance procedures.

On a literal reading of the § 7121, plaintiffs' FLSA rights are within the exclusive jurisdiction of the grievance procedure. An FLSA claim is a grievance within the meaning of the statute, and is not excepted from the exclusive procedures by any subsection of § 7121. Plaintiffs argue, however, that Congress enacted the exclusivity provision in § 7121(a)(1) only to make the grievance procedure exclusive as to matters that would otherwise be appealable through *administrative* procedures. In plaintiffs' view, § 7121(a)(1) did not concern judicial review at all. Plaintiffs are in effect asking the Court to recognize as implied an additional exception to the literal language of the exclusivity provision in § 7121(a)(1).

B. Legislative History.

Plaintiffs rely on the legislative history of the CSRA to establish that Congress did not intend to preempt a unionized civil servant's FLSA cause of action. They first point to the President's Personnel Management Project report, reprinted in Comm. Print 96-7, 96th Cong., 1st Sess. at 1471, which was in large part the basis of the CSRA. The report suggests that a major concern of the Project was rationalizing the complex web of *administrative* appeal procedures in place at the time of the report. Plaintiffs also note that the Conference Report on the final bill states that:

> except for certain specified exceptions, an employee covered by a collective bargaining agreement must follow the negotiated grievance procedures *rather than the agency procedures* available to other employees not covered by an agreement. (emphasis added)

H.R. Rep. No. 1717, 95th Cong., 2d Sess. 157 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 2891.

Finally, plaintiffs point out that in 1974, Congress amended the FLSA to clarify that it applied to federal workers, and provided that the Civil Service Commission (later the Merit System Protection Board) would administer the act with respect to federal workers. In doing so, Congress explicitly stated in 1974 that the granting of administrative authority to the Commission should "not be construed to affect the right of any employee to prosecute an FLSA claim in court." 29 U.S.C. § 204(f).

These bits of legislative history arguably tend to support plaintiffs' position that the Act was intended to apply only to otherwise administrative matters. Plaintiffs argue that Congress would never have *implicitly* overruled a federal employee's right to judicial enforcement of FLSA rights just three years after affirming that the right exists.

However, there is legislative history more directly to the point which strongly supports defendants' position. The original Senate version of the CSRA considered FLSA claims to be a specific exception to the exclusivity provisions of 7121(a), so that FLSA claims could never be grieved. In the context of the statute as enacted, such an exception would fit in § 7121(c). In Conference, the Senate receded to the House version and did not include FLSA claims as an exception. The original Senate version, deleted in conference, provided that:

> (d) A negotiated grievance procedure may cover any matter within the authority of an agency if not inconsistent with the provisions of this chapter, except that it may not include matters involving examination, certification and appointment, suitability, classification, political activities, retirement, life and health insurance, national security, or the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.).

S. Rep. No. 95-969, 95th Cong., 2d Sess. (197), reprinted in U.S. Code Cong. & Admin. News 2723, 2832. Thus, the deletion of the Senate's original version makes clear that FLSA claims are grievable.

Plaintiffs argue that deletion of the Senate version says nothing of whether *judicial* enforcement of the FLSA was intended to be barred—only of whether Congress intended that FLSA claims could be grieved. The Court disagrees. The original Senate version contemplated excluding FLSA claims from the grievance procedures, but Congress decided not to do so. By specifically allowing FLSA claims to become grievable, Congress must have intended that FLSA claims would then be subject to the exclusivity provisions of § 7121(a). There is no clear evidence to suggest that it intended otherwise, and the clear statement in the Act is not ambiguous.

It is of course curious that the Senate would propose that FLSA claims could not be grieved, and then agree

to *require* them to be grieved. But the Court cannot assume that Congress blundered when the language of the statute is unambiguous. The Supreme Court has held that the:

> starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766, 772 (1980). See also *United States v. Gray*, 809 F.2d 579 (9th Cir. 1987). The dispute is whether there is clear legislative intention to the contrary, and the Court finds that there is not. See *Doski v. M. Goldseker Co.*, 539 F.2d 1326, 1332 (4th Cir. 1976) (It is not permissible to construe a statute on basis of a mere surmise as to what legislature intended and to assume that it was only by inadvertance that it failed to state something other than what it plainly stated).

C. Implied Repeal of Statutory Rights.

Plaintiffs argue that Congress could not have intended to extinguish judicial review of an employee's FLSA claim, so soon after affirming that the right existed. Implied repeal of statutory rights are, of course, strongly disfavored. The Supreme Court's most recent interpretation of the CSRA, *United States v. Fausto*, —— U.S. ——, 98 L.Ed.2d 830 (1988), recognized this principle.

This Court does not share plaintiffs' belief that the CSRA impliedly repealed judicial review of a federal employee's FLSA claim. Judicial review is still available for all federal employees not covered by a collective bargaining agreement, and for those employees covered where the collective bargaining agreement excludes FLSA claims from the grievance process. The CSRA did not impliedly repeal any part of the FLSA; it instead cre-

ated a specific exception to the general enforcement scheme that parties to a collective bargaining are free to eliminate by agreement.

The CSRA "comprehensively overhauled the civil service system." *Lindahl v. OPM*, 470 U.S. 768, 773, 84 L.Ed.2d 674, 681 (1985). The Court noted in *Fausto* that it "replace[d] the haphazard arrangements for administrative and judicial review of personnel action, part of the 'outdated patchwork of statutes and rules built up over almost a century' that was the civil service system, S. Rep. No. 95-969, p. 3 (1978)." 98 L.Ed.2d at 838. Although *Fausto* addressed CSRA preemption in the context of adverse personnel action, Congress undoubtedly had the same streamlining philosophy in mind when formulating the mandatory employee grievance procedures.

The Court finds that the implied repeal language of *Fausto* is not directly relevant. In any event, it does not necessarily cut in plaintiffs' direction, as the Court in *Fausto* found an implied repealer of judicial review of determinations under the Back Pay Act.

D. Case Law.

None of the cases cited by the parties address the issue posed by plaintiffs—whether § 7121(a)(1) is intended to channel only claims that were formerly administrative claims into the grievance procedures. However, in *Phillips v. United States*, 11 Ct.Cl. 155 (Cl.Ct. 1986), the court held that § 7121(a)(1) preempts Claims Court jurisdiction over a unionized civil servant's claim for overtime pay under the Federal Employee Pay Act, 5 U.S.C. § 5542. Prior to the CSRA, a federal employee could sue the United States in federal court for overtime pay under the FEPA, without first going to an agency. *Fox v. U.S.*, 416 F.Supp. 593 (E.D.Va. 1976).

Plaintiffs attempt to distinguish *Phillips* arguing that the FEPA, unlike the FLSA, does not provide individual

employees with an "express independent" judicial remedy. But as discussed, *supra*, the Court is not convinced by plaintiffs' argument that the CSRA could not have created an implied repeal. Congressional clarity in providing the judicial right of action in FLSA is therefore not of great weight in interpreting the CSRA.

Plaintiffs also rely on several recent Supreme Court decisions for the proposition that Congress did not intend to preempt federal court jurisdiction. In *Barrentine v. Arkansas-Best Freight*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.E.2d 641 (1987), the Court addressed the issue of whether mandatory grievance procedures contained in a private sector collective bargaining agreement precludes judicial determination of a FLSA claim. In that case, the Court held that prior submission of a FLSA claim to final and binding arbitration procedures pursuant to a collective bargaining agreement does not bar subsequent suit in federal court, since:

> Congress intended to give individual employees the right to bring their minimum-wage claims under the FLSA in court, and because these congressionally granted FLSA rights are best protected in a judicial rather than in an arbitral forum.

Id. at 657. Plaintiffs also cite *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, —— U.S. ——, 94 L.E.2d 563 (1987) for a similar proposition—that a railway worker's FELA tort suit cannot be barred by the exclusive grievance machinery of the Railway Labor Act.

While the holdings in *Barrentine* and *Buell* recognize the individual nature of certain causes of action, they both involved entirely different (albeit analogous) statutory schemes than the CSRA. This Court finds that the statutory language and legislative history of the CSRA clearly prohibit the individual right of action contemplated in the *Barrentine* and *Buell* cases, unless the parties preserve that right in the collective bargaining agree-

ment. Congress could certainly have found circumstances sufficiently different in the public sector compared to the private sector to warrant nonjudicial resolution of FLSA claims.

E. Consequences of a Decision in Favor of Exclusivity.

Plaintiffs argue that it is very unlikely that Congress intended to eliminate a covered employee's individual right to judicial review of an FLSA claim. After the initial grievance, the union decides whether to take the claim to arbitration or not. After arbitration, an appeal may be taken to an administrative review board, but review stops there.

Congress could well have intended such a result. United States labor policy in this century has encouraged reliance on the collective resolution of individual grievances. Union handling of grievances has for the most part proven fast, efficient and fair. Arbitrators with a specific knowledge of an industry are often better equipped to resolve factual disputes. This is especially true in the context of a FLSA claim, where often, as in this case, hundreds of employees are involved and each employee's case must be decided on the facts of his or her actual job duties. Congress has ample precedent in traditional labor law to relegate a FLSA claim to a union initiated grievance/arbitration process.

Plaintiffs object that the government's position would eliminate their individual right to be in federal court as if the procedure for vindicating the FLSA claim were the most important right. The substantive right itself under the FLSA remains intact. This case involves merely the procedural methods of vindicating that right.

III

The Civil Service Reform Act of 1978 provides an exclusive machinery for resolution of employee grievances.

While Congress made certain exceptions to the exclusivity provision contained in 5 U.S.C. § 7121(a), it did not exclude FLSA claims. This Court is unwilling to rewrite an unambiguous statute, and therefore holds in favor of exclusivity. Because the Court dismisses the action for lack of subject matter jurisdiction, it need not consider defendants' arguments that exclusive jurisdiction lies with the Claims Court, or that venue is improper in this district.

The motion to dismiss is granted without leave to amend. The action is dismissed. This is a final order for purposes of Fed.R.Civ.P. 54.

IT IS SO ORDERED.

DATED: Aug. 8, 1988

/s/ Harry L. Hupp
HARRY L. HUPP
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-1576

CARL CARTER, FRANK PERCINA, WILLIAM E. DUNN, DONALD HONAKER, CAROLYN HUDSON, CLARA MORRISON, CHARLENE LIMENIH and SIMILARLY SITUATED UNNAMED PLAINTIFFS,
Plaintiffs-Appellants,

v.

LAWRENCE GIBBS, JAMES A. BAKER III and THE UNITED STATES OF AMERICA,
Defendants-Appellees.

ORDER

A suggestion for rehearing in banc having been filed in this case and a response thereto having been invited by the court and filed,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, ACCEPTED. The judgmeat entered on August 31, 1989, is VACATED and the accompanying opinion is withdrawn. The mandate issued on

November 27, 1989, is RECALLED. Additional briefing and argument are not indicated at this time.

FOR THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated: January 16, 1990

cc: Clerk's Office, DCT
GREGORY O'DUDEN
JANE W. VANNEMAN

CARTER V. GIBBS, 88-1576
(DCT 87-4897)

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-1576

CARL CARTER, FRANK PERCINA, WILLIAM E. DUNN, DONALD HONAKER, CAROLYN HUDSON, CLARA MORRISON, CHARLENE LIMENIH and SIMILARLY SITUATED UNNAMED PLAINTIFFS,

Plaintiffs-Appellants,

v.

LAWRENCE GIBBS, JAMES A. BAKER III and THE UNITED STATES OF AMERICA,

Defendants-Appellees.

ORDER

Before FRIEDMAN, Circuit Judge, MAYER, Circuit Judge, and MICHEL, Circuit Judge.

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on November 27, 1989.

FOR THE COURT,
/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated: November 20, 1989

cc: GREGORY O'DUDEN
JANE W. VANNEMAN

APPENDIX F

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 7121. Grievance procedures

(a) (1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(1) be fair and simple,

(2) provide for expeditious processing, and

(3) include procedures that—

(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employees to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law adminis-

tered by the Equal Employment Opportunity Commission.

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated griev-

ance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

29 U.S.C. § 216. Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision

* * * *

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any

employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

APPENDIX G

Individuals Who Filed Consent Forms With the District Court

Albritton, Harold
Aldrighette, Fred
Allingham, Robert
Amerling, Russell
Anderson, Michael V.
Andrews, C. Wendyle
Arcidiacono, Charles Jr.
Arndt, Mary Roman
Atkinson, John C.
Babin, Barbara
Banks, Wallace G. III
Barker, James S.
Barrett, John J.
Barley, Roy E.
Barna, Gregory B.
Beach, David L.
Bean, James W.
Beard, Judy
Bechtold, Ronald F.
Benoit, Barbara
Bernola, Vincent
Bibber, John
Boos, Ronald
Braxton, James
Brown, William G.
Brummels, James
Brunetti, Achilles
Bruschi, John
Bryan, Richard L.
Bulas, Robert F.
Burke, Anna
Butterman, Arthur
Cain, John E.
Cairns, Edwin G.
Cantrell, James S.
Caputo, Vincent
Carlson, Harold
Carlson, Walter
Carr, Terry A.
Carter, Shelton
Casey, Michael J.
Catherine, Felix H.
Chandler, Allen R.
Christian, Richard D.
Chorman, Lawrence
Ciarrocchi, David
Cleland, Alfred E.
Coleman, Wilmam
Conte, Bruce
Cordrey, Charles E.
Coulter, Catherine
Cowley, Elmer C.
Coyle, Glenn
Crispino, Gerald J.
Cuba, Barry
Culver, Bonnie L.
Cunningham, Edward
Danese, Ronald B.
DeSessa, Christopher S.
Dick, Donald D.
Dielmann, Joseph
Dillard, Christine
Dinan, Gerald W.
Divito, Ralph J.
DeCoux, Daniel J.
Dopp, Bruce B.
Dorothy, Louise J.
Dubovecky, Larry
Durham, Nancy A.
Duval, Dibrell L.
Elles, James W.
Elliot, Billy
Elmo, Frank
Engel, Lawrence R.

Epstein, Marshall
Erickson, Duane H.
Falink, Bruce
Fox, Jack
Franklin, Jerry L.
Frerking, Daryl
Frye, James M.
Gandrud, Peter C.
Garfield, Jeffrey
Gilbert, Donald H.
Giles, Lewis
Gillespie, Michael
Girard, Leo
Goins, Virginia
Gorman, Dennis M.
Governo, Gerald
Graham, John
Graves, Clinton
Gray, Glenn
Green, Glenn
Gregory, Margaret
Gritis, James F.
Gross, George Jr.
Gross, Martin
Gudgell, Donald
Hains, Larry A.
Hale, Leatha
Hammond, Susan P.
Hanratty, Margie L.
Harris, James
Hartline, Lonnie A.
Haxton, J.D.
Hayes, David A.
Heath, Harold
Henkel, Neil
Henry, Jeffrey R.
Hernandez, Roberto
Hertz, Peter M.
Hilton, Clesse S.
Hixenbaugh, John C.
Hlava, Keith A.
Hoefnagel, Steve
Holt, Roger Alan
Hudson, Edd C.
Huebner, Paul M.
Hutchinson, Robert
Hutton, Charles
Ibach, Jerry E.
Ingraffia, Victor
Jacobs, Donald J.
Jacob, Samuel C.
Jagerson, Lincoln
James, Silas, Jr.
Jarvis, Richard L.
Jocuns, Bernard
Jones, Alan C.
Jones, Robert W.
Kahler, Francis
Karafin, Scott J.
Kempler, Donald T.
Kennedy, Virginia
Ketcham, Rosalind
Kingsley, George A.
Kleinknecht, Charles
Klier, Paula
Krawczyk, Walter
Kwiatkowski, Daniel J.
Lambert, David H.
Larochelle, Richard J.
Larson, David A.
Larsen, Dana B.
Lawson, Gwendolyn
Leblanc, Roy G.
Lee, John R.
Lehmann, Arnold G.
Lewandowski, Daniel
Lewis, Kenneth H.
Lindbergh, Kenneth
Lindersmith, Veronica A.
Lindquist, Sheila M.
Longoria, David K.
Luehring, Duane

Lynn, Kenneth B.
Lyon, Frederick
McCaslin, Jack F.
McDaniel, Kenneth
McDonough, Francis M.
McGrath, John W.
McHale, Joseph
McLeod, Bruce
McNally, Keith T.
MacKenzie, Myrtle
Mansfield, William
Marciello, Michael
Marine, Dewey R.
Marks, Howard
Martin, Shirley
Martinez, Guadalupe
Martino, Robert J.
Maurer, Michael
May, Denzel E.
Mazur, John M.
Meickle, William R.
Meleo, Ralph P.
Mertens, Raymond
Melendez, Arturo
Milbourn, Thomas E.
Milligan, Daniel
Mills, Donna L.
Monaco, Joseph A. Jr.
Moore, Robert E.
Morrison, Joseph
Mozdziak, Richard
Murano, Tad T.
Nelson, Arthur
Nelson, Nicholas
Nelson, Severt J.
Newman, Eileen P.
Newsom, Calvin
Ng, Tillie
Niestedt, William
Nussenblatt, Jerry
Oliveira, Leonard
Olsen, James A.
Ottavelli, Ronald
Owens, Joyce M.
Owens, Douglas L.
Palandro, Pat
Parsons, Larry J.
Partin, Fred L.
Patrick, Milton D.
Peden, Samuel S.
Peters, John
Peterson, Deanna
Phillips, Jack
Pierron, Patrick E.
Plante, Michael
Polcari, Kenneth
Ponte, Joseph M.
Powers, Graham Jr.
Preston, Elaine V.
Privett, Jonathan
Proctor, Richard
Raguso, Anthony
Rasmussen, George
Rateau, Thomas A.
Reed, Joseph R.
Remkiewicz, Eric
Rencher, Dennis M.
Reuter, John C.
Reynolds, Tryphena
Rice, Joseph E.
Richards, James
Rifkin, Arnold
Riley, James E.
Roberts, John Jr.
Robinette, Shirley
Ronquillo, David
Rosen, Charles F.
Rowley, Robert A.
Roybar, Anthony
Salas, Betsey R.
Salek, William A.
Salyer, Raymond

Salvatore, Tagliaferno
Sappey, Stephen
Scalise, Michael
Schabacker, Randall
Schell, Carl W.
Schramm, Frederick W. Jr.
Schukies, Michael G.
Scrimo, Timothy
Seal, Elbert
Seid, Wendy B.
Seymore, Oscar
Sherman, Stewart
Shintaku, Ernest T.
Shultz, Rea Ann
Sica, Stephen M.
Siirtola, Francis
Sisk, Kenneth E.
Smiloff, Jack
Smith, Ellison G.
Smith, Norman W.
Sneary, Russell C.
Sobler, Simeon S.
Sobrevilla, Ricardo
Sorum, Gordon
Stevens, Harry L.
Strauss, Arnold R.
Stypul, Ronald
Sullivan, Kevan M.
Swanfield, Darrel
Swartz, James
Tacopina, Joseph
Thomas, Keith L.
Thomas, Mildred
Thompson, Joseph
Thompson, Lorita M.
Tompkins, Lawrence
Tryba, Mark J.
Uhrich, Thomas
Valentino, Richard
Vander Linden, John
Van Grunsven, Dan
Vilardo, Joseph L.
Vincent, Larry D.
Walker, Vera M.
Wallin, Richard A.
Warren, Johnny L.
Welch, Donald
Welch, Fred W.
White, Gloria J.
Wilkes, Mary R.
Wilson, Kenneth
Wilson, Cecil R.
Williams, Daniel
Williams, Donald
Williams, James P.
Williams, Ronald
Willis, Rachel A.
Wolf, Peter
Wolmetz, Lester
Wood, Lyle E.

Supreme Court, U.S.
FILED
MAY 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1675

(2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CARL CARTER, FRANK PERCINA, WILLIAM E. DUNN, DONALD HONAKER, CAROLYN HUDSON, CLARA MORRISON, CHARLENE LIMENIH, and SIMILARLY SITUATED UNNAMED PLAINTIFFS, *Petitioners*,

v.

FRED GOLDBERG, JAMES A. BAKER III AND THE UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

SUPPLEMENTAL BRIEF FOR PETITIONERS

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8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1675

CARL CARTER, FRANK PERCINA, WILLIAM E. DUNN, DONALD HONAKER, CAROLYN HUDSON, CLARA MORRISON, CHARLENE LIMENIH, and SIMILARLY SITUATED UNNAMED PLAINTIFFS, *Petitioners*,

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FRED GOLDBERG, JAMES A. BAKER III AND THE UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners submit this supplemental brief to provide the Court with Senior Circuit Judge Friedman's dissent to the majority opinion by the *en banc* court below. Judge Friedman's dissent (Appendix A), relies upon and summarizes his earlier majority opinion for the panel, which was vacated by the *en banc* ruling. As explained in the Federal Circuit's May 23, 1990 letter (Appendix B), the clerk's office in that court originally forwarded the *en banc* opinion to the parties without the dissent. The clerk's office sought to correct its error by later serving copies of the complete *en banc* ruling. It did not, however, notify the parties that there was a missing

dissent, which has just been discovered by petitioners' counsel. We have alerted government counsel, who was also unaware that a dissenting opinion had been filed.

Respectfully submitted,

GREGORY O'DUDEN *
Director of Litigation

ELAINE KAPLAN
Deputy Director of Litigation

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May 1990

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-1576

CARL CARTER, FRANK PERCINA, WILLIAM E. DUNN, DONALD HONAKER, CAROLYN HUDSON, CLARA MORRISON, CHARLENE LIMENIH and SIMILARLY SITUATED UNNAMED PLAINTIFFS,

Plaintiffs-Appellants,

v.

LAWRENCE GIBBS, JAMES A. BAKER, III and THE UNITED STATES OF AMERICA,

Defendants-Appellees.

Appealed from U.S. District Court
for the Central District of California
Judge Hupp

Decided: March 30, 1990

FRIEDMAN, *Senior Circuit Judge*, dissenting.

For the reason given in my opinion for the panel, reported at 883 F.2d 1563, I would reverse the judgment of the district court. To summarize, I conclude that:

1. The holding that the Civil Service Reform Act of 1978 bars government employees covered by a collective

bargaining agreement containing a grievance procedure that does not exclude overtime claims under the Fair Labor Standards Act from maintaining a district court suit asserting such claims, constitutes a *pro tanto* repeal of the right given government employees to maintain such a suit in the district court. This is so because it "eliminates the right to sue previously granted by another federal statute." 883 F.2d 1566. As the Supreme Court frequently has stated, most recently in *United States v. Fausto*, 484 U.S. 439, 452 (1988), "repeals by implication are strongly disfavored," are "not favored," or are "disfavored." See the cases cited, 883 F.2d at 1566.

2. Since Congress had given government employees the right to sue under the Fair Labor Standards Act only in 1974, four years before it enacted the Civil Service Reform Act, "one would think that if Congress had intended the Reform Act to take away that right for the substantial number of federal employees covered by collective bargaining agreements, it would expressly have so provided or stated." *Id.* at 1567. There is nothing in the language or the legislative history of the Reform Act expressly showing that Congress so intended.

3. In *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), the Supreme Court held that a provision in a collective bargaining agreement requiring that "any controversy" between the parties be resolved through the binding grievance procedure under the contract, did not bar employees covered by the contract, who unsuccessfully had invoked the grievance procedure to assert claims based upon violations of the Fair Labor Standards Act, from maintaining an action in the district court asserting those claims. Although *Barrentine* is distinguishable because it involved solely a collective bargaining agreement and did not involve the impact of the Civil Service Reform Act upon the Fair Labor Standards Act, the reasoning of the Supreme Court is equally

applicable to the present situation and calls for the same result here.

My views are developed in considerable detail in the panel opinion, and there is no occasion to repeat them here. In my opinion, the "exclusivity" provision of the Reform Act cannot properly be applied to bar the appellants from maintaining a district court action alleging violations of the Fair Labor Standards Act.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 Madison Place, N.W.
Washington, D.C. 20439

Francis X. Gindhart
Clerk

Telephone: 633-6550
Area Code 202

May 23, 1990

Mr. Gregory O'Duden
Director of Litigation
1730 K Street, N.W.
Suite 1100
Washington, D.C. 20006

Re: *88-1576, CARTER V GIBBS*

Dear Mr. O'Duden:

This will confirm that the court inadvertently served counsel with an incomplete copy of the March 30, 1990 *in banc* opinion in this matter, by failing to attach the dissent of Senior Circuit Judge Friedman. After the court discovered its error, we forwarded on April 2 complete copies of the *in banc* opinion, including Judge Friedman's dissent, but did not provide a transmittal letter or other notice to explain that we were providing a missing dissent.

We regret any inconvenience that this may have caused.

Very truly yours,

FRANCIS X. GINDHART
Clerk

By /s/ Diane Frye
Chief Deputy Clerk

cc: Jane W. Vanneman

Supreme Court, U.S.
FILED
JUN 25
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-1675

In the Supreme Court of the United States

OCTOBER TERM, 1990

CARL CARTER, ET AL., PETITIONERS

v.

FRED T. GOLDBERG, JR.,
COMMISSIONER OF INTERNAL REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
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STUART M. GERSON
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QUESTION PRESENTED

Section 7121(a) of Title 5, U.S.C., provides that the grievance procedures set out in a collective bargaining agreement governing federal employees "shall be the exclusive procedures for resolving grievances which fall within its coverage." The question presented is whether this provision limits federal employees with grievable claims under the Fair Labor Standards Act to the remedies provided by the grievance procedures in the applicable collective bargaining agreement.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Andrews v. *Louisville & Nashville Ry.*, 406 U.S. 320 (1972)	5
Atchison, Topeka & Santa Fe Ry. v. *Buell*, 480 U.S. 557 (1987)	5
Barrentine v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981)	4
Karahalios v. *National Federation of Federal Employees*, 109 S. Ct. 1282 (1989)	4
United States v. *Fausto*, 484 U.S. 439 (1988)	5

Statutes:

Civil Service Reform Act of 1978, 5 U.S.C. 7111 *et seq.*:	
5 U.S.C. 7121	3
5 U.S.C. 7121(a)	2, 3, 5
5 U.S.C. 7121(c)	3, 4
5 U.S.C. 7121(d)	2, 4
5 U.S.C. 7121(e)	2-3, 4
5 U.S.C. 7701	4
5 U.S.C. 7703	4
Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*	2
Railway Labor Act, 45 U.S.C. 153 First (i)	5
28 U.S.C. 1295(a)(2)	3

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1675

CARL CARTER, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-13a) is not yet reported. The opinion of the panel of the court of appeals (Pet. App. 14a-37a), which was subsequently vacated, is reported at 883 F.2d 1563. The decision of the district court (Pet. App. 38a-47a) is reported at 690 F. Supp. 897.

JURISDICTION

The judgment of the en banc court of appeals was entered on March 30, 1990. The petition for a writ of certiorari was filed on April 27, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The seven named petitioners, who are members of bargaining units represented by the National Treasury Employees Union, are employed by the Internal Revenue Service as revenue officers and tax auditors. The IRS determined that petitioners are exempt from the overtime pay requirements of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* Petitioners filed suit in the United States District Court for the Central District of California alleging that the IRS had erred and that they were entitled to FLSA overtime pay for the overtime hours that they had worked. Pet. App. 2a, 38a.

The district court granted the government's motion to dismiss. Pet. App. 38a-47a. It noted that it was undisputed that petitioners' claims for FLSA overtime pay are "grievable through the collective bargaining agreement." *Id.* at 40a. Since 5 U.S.C. 7121(a), part of the Civil Service Reform Act of 1978 (CSRA), provides that the grievance procedures set out in a collective bargaining agreement governing federal employees "shall be the exclusive procedures for resolving grievances which fall within its coverage," the court held that it lacked subject matter jurisdiction over petitioners' claims.

The en banc Federal Circuit affirmed the decision of the district court by an eight-to-one vote. Pet. App. 1a-13a; Pet. Supp. Br. App. 1a-3a. Like the district court, it relied on the fact that the grievance procedure in the collective bargaining agreement applied to the dispute and that Section 7121(a) provides that an applicable grievance procedure is exclusive. The en banc court also noted that Congress had listed matters for which grievance procedures are not exclusive in Section 7121(d) and Sec-

tion 7121(e), and had further provided in Section 7121(c) that certain matters are not grievable, but had not listed FLSA overtime claims in any of those exceptions to the general rule of exclusivity. Moreover, the court added, it was clear that the "absence of an express provision for overtime claims is not the product of congressional inattention to the FLSA," since the Senate version of the bill that was enacted had included FLSA claims in the exception in Section 7121(c) but the conference committee had deleted that provision. Pet. App. 7a.

ARGUMENT

The decision of the en banc Federal Circuit is correct. That court is uniquely competent in federal personnel matters; indeed, as petitioners note (Pet. 6-7 n.4), it has exclusive jurisdiction to entertain appeals in cases of this sort. 28 U.S.C. 1295(a)(2). There is no reason for further review of its decision in this case.

As the court of appeals concluded, the unambiguous language of Section 7121(a) resolves the question presented. That exclusivity provision states that the grievance procedures set out in a collective bargaining agreement "shall be the exclusive procedures for resolving grievances which fall within its coverage." Since petitioners could file grievances under the applicable collective bargaining agreement raising the same claims that they seek to bring to court, their claims are precluded by the exclusivity provision of the CSRA.

Moreover, as the court of appeals stressed, the structure and legislative history of Section 7121 make clear that Congress intended that result. As the court noted, the Senate had included FLSA mat-

ters in Section 7121(c), which makes certain issues non-grievable. But while the conference committee retained some matters (such as retirement, life insurance, national security suspensions, and classification matters) on the list of non-grievable items, it deleted FLSA matters from that list. In doing so, Congress did not add FLSA disputes to the list of matters (such as challenges to adverse personnel actions) which, under Sections 7121(d) and 7121(e), may be raised either by the filing of a grievance or by initiating other proceedings.[1] Thus, Congress knew how to except matters from the exclusivity provision and considered whether to do so in the case of FLSA overtime pay disputes, but chose not to include such disputes in the list of exceptions.

Petitioners nevertheless contend (Pet. 7-12) that the result they urge is mandated by this Court's decision in *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), a private-sector case in which the Court held that the plaintiffs were not barred from bringing an FLSA action by the exclusivity provision in a collective bargaining agreement. But this Court made clear in *Karahalios* v. *National Federation of Federal Employees*, 109 S. Ct. 1282 (1989), that "private sector law is not controlling in the context of federal labor controversies." Pet. App. 11a. That is certainly the case here, where a federal *statute*, not a provision of a collective bargaining agreement, makes the grievance procedure

[1] Petitioners argue that the references in Section 7121(d) and Section 7121(e) are only to "administrative" and not to judicial procedures. Pet. 17-19. That argument is without merit: it finds no support in the text or purpose of the statute, and indeed the matters listed in Section 7121(e) are subject to both administrative and judicial review. See 5 U.S.C. 7701, 7703.

the exclusive remedy with respect to matters that it covers.[2] Since "the CSRA is unique in prescribing 'exclusive' procedures for the resolution of grievances" (*ibid.*), private-sector law is not controlling.

Petitioners also argue (Pet. 13-15) that *United States* v. *Fausto*, 484 U.S. 439, 453 (1988), supports their contention because the Court, while holding that the CSRA had impliedly repealed a judicially created cause of action, suggested that it might reach a different result in the case of a cause of action grounded in express statutory text. However, contrary to petitioners' contentions, no repeal by implication is at issue here. The exclusivity provision of Section 7121(a) is clear and explicit. At the same time, federal employees who are not represented by unions can bring suit under the FLSA. Moreover, petitioners, acting through their union, can seek to preserve their ability to enforce their FLSA rights through lawsuits by negotiating for a provision excepting FLSA disputes from coverage under the grievance provision of their collective bargaining agreement.

For the same reason, there is no merit to petitioners' contention (Pet. 10) that a grievance remedy is deficient because arbitrators cannot award all of the

---

[2] Thus, *Atchison, Topeka & Santa Fe Ry.* v. *Buell*, 480 U.S. 557 (1987), also relied upon by petitioners (Pet. 14), is similarly not in point. Like *Barrentine*, the *Buell* case dealt with the private sector. And like *Barrentine*, the case did not involve a statute that expressly provides for the exclusivity of grievance procedures, although the statute in question (the "minor disputes" provision of the Railway Labor Act, 45 U.S.C. 153 First (i)) has been construed to preempt parallel remedies under state law. See *Andrews* v. *Louisville & Nashville Ry.*, 406 U.S. 320, 325 (1972); see also *Buell*, 480 U.S. at 565-566.

relief available in court actions, particularly liquidated damages. Given the many advantages of the grievance system—advantages that include expedition and informality—federal employees might reasonably choose to pursue FLSA disputes through that channel rather than in court. But if federal employees decide that the ability to obtain liquidated damages from a court outweighs the advantages of the grievance system, they can seek to make FLSA matters non-grievable.

Finally, there is no merit to petitioners' contention (Pet. 13) that it is "inconceivable" that Congress "extinguished" federal employees' FLSA rights four years after it extended the Act's coverage to those employees. Petitioners retain their rights under the FLSA; the only question is whether, in some circumstances, established grievance procedures are the exclusive means of enforcing those rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
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JUNE 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 958

Supreme Court, U.S.
FILED
JUL 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1675

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FRED GOLDBERG, JAMES A. BAKER III AND THE UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITIONERS' REPLY BRIEF

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TABLE OF AUTHORITIES

CASES Page

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) 2, 3, 4, 9
Bureau of Alcohol, Tobacco, and Firearms v. FLRA, 464 U.S. 89 (1983) 8
Karahalios v. National Federation of Federal Employees, 109 S. Ct. 1282 (1989) 3, 4
Rodriguez v. United States, 480 U.S. 522 (1987) 9
United States v. Fausto, 484 U.S. 439 (1987) 7, 8

STATUTES AND REGULATIONS

5 U.S.C. 5542 6
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 111 ..... *passim*
5 U.S.C. 7101(a) 8
5 U.S.C. 7121 ..... 4, 5
5 U.S.C. 7121(a) 7
5 U.S.C. 7121(a)(1) 4, 6
5 U.S.C. 7121(c) 6
5 U.S.C. 7121(d) 5, 6, 7
5 U.S.C. 7121(e) 5, 6, 7
5 U.S.C. 7703 5
Fair Labor Standards Act, Ch. 676, 52 Stat. 1060
29 U.S.C. 204(f) 3
29 U.S.C. 216(b) 1, 3

MISCELLANEOUS

Executive Order 11491, Section 13 ..... 4, 5
Legislative History of the Federal Service Labor Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, 96th Cong., 1st Sess. (Comm. Print 1979) 5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1675

CARL CARTER, FRANK PERCINA, WILLIAM E. DUNN, DONALD HONAKER, CAROLYN HUDSON, CLARA MORRISON, CHARLENE LIMENIH, and SIMILARLY SITUATED UNNAMED PLAINTIFFS,

Petitioners,

v.

FRED GOLDBERG, JAMES A. BAKER III AND THE UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITIONERS' REPLY BRIEF

Petitioners seek review of a ruling by the Federal Circuit which divests more than one million federal workers who are covered by collective bargaining agreements of their express and unconditional statutory rights to enforce the Fair Labor Standards Act (FLSA) through civil actions brought in district court. *See* 29 U.S.C. 216(b). This unfettered access to a judicial remedy has been an essential element of FLSA enforcement for over fifty years, without regard to any collective bargaining arrangements. But the lower court's decision creates a different rule for federal employees who are covered by collective bargaining agreements. That decision—in di-

rect contravention of the principles this Court set forth in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981)—abolishes those express statutory rights for all such federal employees, union member and non-member alike, substituting for them negotiated grievance-arbitration procedures.

The government does not deny our contentions (Pet. 7-12) that the lower court's decision will have a profound impact upon enforcement of the FLSA in the federal sector. Significantly, the individual employee has no power to invoke arbitration; that power belongs exclusively to the union. Further, no judicial review of the grievance-arbitration procedure is available, and the government has consistently contended (*see* Opp. Cert. 6) that arbitrators cannot afford injured employees full relief, including an award of liquidated damages. Moreover, collective bargaining agreements routinely require employees to invoke the grievance procedure within a few days or weeks of the date that the grievance arose, while the statute of limitations for filing civil actions under the FLSA is at least two years, and can be three years. *See* Pet. 11.

The government nonetheless resists review, contending that *Barrentine* is irrelevant because it arose in the private sector and, further, that the Civil Service Reform Act of 1978 compelled the Federal Circuit's ruling. These meritless contentions provide no justification for denying review of the important questions this case presents.

1. In *Barrentine v. Arkansas-Best Freight System, Inc.*, this Court held that the rights of individual employees to obtain judicial enforcement of their FLSA claims in district court, including liquidated damages, are substantive and non-waivable. 450 U.S. at 740. It specifically observed that FLSA rights "devolve upon [employees] as individual workers, not as members of a collective organization." *Id.* at 745. Congress gave in-

dividual employees the right to sue for back pay, liquidated damages, and attorney fees "to encourage employees to enforce their FLSA rights in court, and thus to further the public policies underlying the FLSA." *Id.* at 740, n.16. Relegating individual FLSA claims to the arbitral forum, which is controlled exclusively by the union, undermines this enforcement scheme. *Id.* at 742; *see also* Brief for the United States as *Amicus Curiae*, Barrentine v. Arkansas-Best Freight System, Inc., No. 79-2006 (Sup. Ct.) at 1 ("[a]ny restriction on the ability of affected employees fully to pursue their statutory rights . . . has a significant negative impact on the enforcement of the Act").

In opposing review here, the government cannot reconcile the lower court's decision with *Barrentine*, nor does it attempt to do so. It can only contend—unpersuasively, at best—that this Court should ignore *Barrentine* simply because that case arose in the private sector and petitioners are federal employees. *See* Opp. Cert. at 4. *Barrentine*, however, may not be casually disregarded on the grounds that it is " 'private sector law'." (*see id.*, quoting Pet. App. 11a). Congress extended full FLSA rights to individual federal employees in 1974—including the right to prosecute violations of that Act in district court. 29 U.S.C. 204(f); 216(b). *Barrentine*, therefore, represents this Court's construction of a law—the FLSA—that is fully and explicitly applicable in the federal sector.[1]

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[1] *Karahalios v. National Federation of Federal Employees*, 109 S. Ct. 1282 (1989) does not support the government's argument that *Barrentine* may be disregarded because it arose in the private sector. *See* Opp. Cert. at 4, citing *Karahalios*. In *Karahalios*, the Court rejected a federal employee's reliance upon judicial interpretations of the National Labor Relations Act (NLRA), to support his claim that he enjoyed an implied right of action to enforce the duty of fair representation set forth in the Civil Service Reform Act. *See id.* at 1287-88. The difference between *Karahalios* and this case is obvious; the NLRA does not govern federal sector labor rela-

In fact, *Barrentine*'s recognition of the pivotal role played by an individual worker's unconditional right to judicial enforcement—including liquidated damages—has even greater importance in the federal sector. As we have explained, the Secretary of Labor, who routinely brings FLSA suits for private sector workers, is not empowered to sue on behalf of injured federal employees. *See* Pet. 8-9. The individual employee's right to sue is thus far more important in the federal sector. The government's conclusory rejection of *Barrentine*'s applicability to this case is, therefore, utterly baseless.

2. Having no substantive response to *Barrentine*, the government relies solely upon the "exclusive procedures" language of 5 U.S.C. 7121(a)(1). That provision, however, does not affect in any way the crucial right the FLSA grants individual federal employees to prosecute their claims in court. In our opening brief (at 16-19) we explained in detail section 7121's legislative history, as well as its evolution from the Executive Order scheme that preceded the Civil Service Reform Act (CSRA). We demonstrated that the language, structure, and history of section 7121 (including specific references to the exclusivity provision in the Conference Committee Report), establish beyond doubt that Congress enacted section 7121 merely to regulate the relationship between the negotiated grievance procedure and the confusing array of pre-CSRA agency appeals procedures. Congress had no intent to disturb the rights of employees to exercise explicit judicial causes of action conferred by other statutes. *See* Pet. 17-19.[2]

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tions, while the FLSA is fully applicable in the federal sector. *Karahalios* did not authorize the lower court to disregard decisions by this Court interpreting a statute—the FLSA—which by its terms applies to both private and federal sector employees.

[2] The very term used in Section 7121(a)(1)—"exclusive procedures"—was carried over from Executive Order 11491, as amended. Section 13 of the Order provided that the negotiated procedure "shall

The government's opposition offers no rebuttal of our extensive discussion of the evolution and structure of section 7121; it virtually ignores it.[3] At the same time, it identifies *nothing* in any of the Committee reports or lengthy debates surrounding the passage of the CSRA which supports its own sweeping interpretation of the "exclusive procedures" language. Its inability to find *any* support in the legislative history is particularly significant given the fact—which the government does not dispute—that its interpretation could dramatically reduce the availability of a broad range of judicial remedies to individual federal employees who are covered by collective bargaining agreements, union member and nonmember alike. *See* Pet. at 20.

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be the exclusive procedure available to the parties and the employees in the unit for resolving grievances which fall within its coverage." *Legislative History of the Federal Service Labor Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, 96th Cong., 1st Sess. (Comm. Print 1979) (hereinafter "Leg. Hist.") at 1346. There was never any suggestion during the Executive Order regime that this language had any preemptive effect upon judicial rights of action. *See also* Pet. at 18 & n.14 (discussing relationship between Executive Order and subsections (d) and (e) of section 7121).

[3] The government merely asserts (Opp. Cert. 4, n.1) that our argument "finds no support in the text or purpose of the statute," but does not bother to address the discussion of the statute's text and purpose that our petition set forth at length. Its further observation (*id.*) that the matters listed in section 7121(e) are "subject to both administrative and judicial review" is irrelevant. Although the matters covered by section 7121(e) are ultimately subject to judicial review, the actual function of that provision is to preserve employees' rights to file administrative appeals with the Merit Systems Protection Board (MSPB). The further right to judicial review of the MSPB's decisions is granted under a separate statutory provision—section 7703. The government therefore, has not addressed the key point—that subsections (d) and (e) concern the right to choose negotiated procedures or administrative remedies, and not judicial causes of action.

3. The government contends, nonetheless, that Congress must have meant to preclude petitioners from enforcing their FLSA rights in court because the Conference Committee deleted FLSA claims from the list of non-grievable matters set forth in the Senate version of section 7121(c), and because the Committee did not add FLSA disputes to the matters excepted from the exclusivity provision by sections 7121(d) and (e). Opp. Cert. 3-4. This legislative history, however, completely begs the question. While Congress ultimately decided to *permit* employees to use the negotiated procedure to challenge FLSA violations (as provided in the House bill) it takes a considerable leap in logic to conclude that by doing so it also decided to *preclude* employees who could file such grievances from exercising the FLSA civil enforcement rights it had granted them only four years earlier.[4]

Similarly, the Conference Committee's failure to except FLSA enforcement actions from the exclusivity provision by listing such actions in subsection (d) or (e) of section 7121 does not assist the government's position. The "omission," in fact, is entirely consistent with our argument that Congress never intended section 7121(a)(1) to limit union-represented employees' rights to prosecute civil actions; in short, there was no reason for the Committee to take steps to preserve employees' rights to prosecute FLSA enforcement actions because Congress never

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[4] The legislative history actually indicates that the House Committee made FLSA claims grievable at the request of the Comptroller General, who had urged Congress to authorize such grievances because FLSA overtime claims often relate to overtime claims under 5 U.S.C. 5542, which had long been subject to arbitration in the federal sector. *See* Leg. Hist. at 1118; 1126. There is no indication that either the House or the Conference Committee that adopted this portion of the House Bill contemplated that in acceding to the Comptroller General's request it was also depriving employees of civil enforcement rights. The House bill, in fact, contained no exclusivity provision at all.

contemplated that the exclusivity provision would affect such rights.

The government's characterization of this legislative history is, in the end, misleading in the extreme. It asserts that by making FLSA claims grievable, but not explicitly preserving employees' statutory rights to sue, Congress demonstrated that it "knew how to except matters from the exclusivity provision and considered whether to do so in the case of FLSA overtime pay disputes, but chose not to include such disputes in the list of exceptions." Opp. Cert. 4. In fact, all that Congress considered was whether to give employees the option to grieve FLSA violations; nothing in the legislative history supports the government's further claim that Congress also considered whether to include FLSA matters in the "list of exceptions" to the exclusivity provision (contained in sections 7121(d) and (e)), much less that it "chose" not to do so.

4. In our petition (at 13-15), we showed that the Federal Circuit's decision is inconsistent with *United States v. Fausto*, 484 U.S. 439 (1987) and related cases, which hold that implied repeals of "express statutory text" are "strongly disfavored" because it is "strongly presumed that Congress will specifically address language in the statute books that it wishes to change." *Id.* at 453. Because there is no "clear repugnancy" (*id.*) between the FLSA and the CSRA, the lower court's ruling is incorrect. *See* Pet. at 15-19.

The government's various justifications for disregarding these principles (Opp. Cert. 5-6) are meritless. For example, the government claims that there has been no repeal by implication because "the exclusivity provision of section 7121(a) is clear and explicit." Opp. Cert. at 5. Of course, as we have shown, the lower court misinterpreted the exclusivity provision. In any event, however, the court of appeals' decision effects an implied and not express repeal of petitioners' FLSA rights because section 7121(a) does not "specifically address" the right

to judicial enforcement the FLSA affords them. *See Fausto*, 484 U.S. at 453.

Further, it is irrelevant that employees who are not represented by a union still retain their unfettered rights to enforce their FLSA claims in court regardless of agreements reached in collective bargaining. *See* Opp. Cert. 5. Petitioners and one million other federal employees covered by collective bargaining agreements lose that right under the ruling below. Indeed, the ruling below gives a positive preference to employees who are not union-represented, a result surely antithetical to the CSRA. *See Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 107 (1983) (one "major purpose" of the CSRA was to strengthen the position of federal unions and make collective bargaining "a more effective instrument of the public interest"); 5 U.S.C. 7101(a) (finding that "labor organizations and collective bargaining are in the public interest").

Similarly, the fact that petitioners can ask their union to make an effort to resurrect their rights to judicial enforcement through the collective bargaining process (Opp. Cert. 5) does not answer the question posed. It merely means that if the union is inclined to preserve the judicial remedy it must sacrifice the grievance right and make other concessions just to buy that remedy back for employees.

5. Finally, in a futile effort to minimize the importance of the rights the lower court's decision extinguishes, the government suggests (Opp. Cert. 6) that some employees may prefer arbitration to judicial enforcement even at the cost of giving up control of their cases, judicial review, liquidated damages, attorney fees, and perhaps several years of backwages. We think it highly implausible, if not inconceivable, that employees challenging serious FLSA violations (like the class of several hundred employees of the Internal Revenue Service whose rights are at issue here) would choose to exchange these significant rights for the greater "informality" or

"expedition" that arbitration sometimes offers. *See* Opp. Cert. 6. But, in any event, the key point is that the Federal Circuit's decision does not permit individual workers to make a "choice" (*see id.*); it relegates that choice to the collective bargaining process—in direct contravention of *Barrentine*.

Thus, the government's contention (Opp. Cert. 6) that no FLSA right has been lost, and that only a procedure for enforcing the FLSA is at issue in this case, is insubstantial, at best. *Barrentine* establishes that the rights of individual employees to prosecute their FLSA claims in court are *substantive* and non-waivable. Because the government has identified no evidence that when Congress enacted the Civil Service Reform Act it had *any* intent, much less a "clear and manifest" one (*Rodriguez v. United States*, 480 U.S. 522, 524 (1987)), to repeal those important substantive FLSA rights, and because the Federal Circuit's decision seriously undermines vigorous enforcement of the FLSA in the federal workplace, this Court's review is imperative.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 1990